TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 229.

WILLIAM F. DAVIS, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS.

FILED FEBRUARY 20, 1895.

(15,801.)

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The Commonwealth of Massachusetts, by complaint, plaintiff, and William F. Davis, defendant, in a plea of not guilty, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said William F. Davis, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second day of March next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the second day of February, in the year of our Lord one thousand eight hundred and ninety-five.

BENJ. H. BRADLEE,
Deputy Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

ALBERT MASON,
Chief Justice Superior Court.

2 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

And now, here, the judges of the superior court of said Commonwealth make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal the Superior Court.

In testimony whereof I, John P. Manning, clerk of said superior court for the transaction of criminal business within and for said county, have hereto set my hand and the seal of said court this sixth day of February, A. D. 1895.

JOHN P. MANNING, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our superior court for the transaction of criminal business within and for the county of Suffolk, begun and holden at Boston on the first Monday of January, in the year of our Lord one thousand eight hundred and ninety-five, it is thus contained, the following being the entire record in the case of The Commonwealth of Massachusetts *versus* William F. Davis:

The following is the complaint entered in said superior court from the municipal court of the city of Boston:

4 *Complaint.*

To the justices of the municipal court of the city of Boston, holden at said Boston for the transaction of criminal business within the county of Suffolk:

John W. Little, of the city of Boston, in the county of Suffolk, police officer, in behalf of the Commonwealth of Massachusetts, on oath, complains that William F. Davis, of said city of Boston, on the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-four, at the city of Boston aforesaid, and within the judicial district of said court, in and upon certain public grounds of said city, within said district, called the "Common," did make a public address, the same not being then and there in accordance with a permit from the mayor of said city, against the peace of said Commonwealth, the form of the statute of said Commonwealth, and the revised ordinance of said city, in such case made and provided.

JOHN W. LITTLE.

CITY OF BOSTON, *To wit:*

Taken and sworn to this eleventh day of June, in the year of our Lord one thousand eight hundred and ninety-four, before said court.

ARTHUR P. HARDY,
Assistant Clerk.

A true copy.
Attest: FRED. C. INGALLS, *Clerk.*

5 Said complaint was entered in said superior court from said municipal court at the July term, A. D. 1894, when the said Davis, by his attorney, renewed the motion to quash that was duly filed in said municipal court, and said motion is as follows:

6 *Defendant's Motion to Quash Complaint.*

And now comes said defendant and moves that said complaint be quashed, and for the following reasons, to wit:

First. Because said complaint sets forth no offence in conformity with the requirements of the statutes of this Commonwealth.

Second. Because said complaint contains no averment that the making of the address alleged did disturb the public peace, or did interfere with or obstruct others, or did threaten so to do.

Third. Because there is not any valid and constitutional law, statute, or ordinance of said city, or any valid or constitutional law of said Commonwealth, by virtue of which said complaint can be made and maintained.

Fourth. Because the by-law or ordinance under which said complaint was made is in derogation of and violates the rights of the defendant, and especially as secured to him and all the people of this Commonwealth, by the bill of rights in the constitution of this State, and in the second (2), tenth (10), eighteenth (18), and nineteenth (19) sections thereof.

Fifth. Because the by-law or ordinance under which said complaint was made is subversive of and violates the rights secured to the defendant and to all citizens of the United States, by the provisions of section one (1) of article fourteen (14), of the amendments of the Constitution of the United States.

Sixth. Because the said by-law or ordinance under which said complaint was made invests the mayor of the city of Boston with arbitrary and despotic power, adverse to and subversive of the equal and just rights of the citizens of this State and of the United States, and denies to this defendant the equal protection of the laws as secured to him and all citizens of this State and of the United States by the provisions of section one (1) of article fourteen (14) of the amendments of the Constitution of the United States.

Seventh. Because said by-law or ordinance is unreasonable, unnecessary, and useless for the preservation of the public peace, and the existence and the enforcement of said by-law or ordinance tend to provoke disturbance and breaches of the peace, by arbitrary and oppressive denial of equal rights and equal protection of the laws; and said by-law or ordinance is unconstitutional and void.

And it violates the constitution of this State and the Constitution of the United States, and article one (1) in addition to and amendment of the Constitution of the United States, and article fourteen in amendment of same.

By his attorney, J. WINTHROP PICKERING.

7 And said motion, after a hearing, was overruled by said superior court, and said Davis was set at the bar and for trial put himself upon the country, and the Commonwealth did the like, by its attorney, Michael J. Sughrue, Esquire.

A jury was empanelled and sworn to try the issue, to wit, Francis A. Foster, foreman, and eleven of his fellows, who, after hearing and understanding all matters and things concerning the same, returned their verdict and on oath said thereof that said Davis was guilty.

Thereupon said Davis, by his attorney, filed exceptions to the rulings of the presiding justice at said trial.

Said complaint was thence continued from term to term to the following October term, when the exceptions aforesaid, being examined and found conformable to the truth, were allowed and were ordered to be transmitted to the supreme judicial court of said Commonwealth, and said complaint was ordered to be continued to await the determination of the justices of said supreme judicial court.

And said exceptions are as follows:

8 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Superior Court for the Transaction of Criminal Business, July Term, A. D. 1894.

COMMONWEALTH }
v. }
WILLIAM F. DAVIS. }

Defendant's Exceptions.

A complaint made in the municipal court of the city of Boston for criminal business, brought to this court by appeal, charged that the defendant, on the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-four, at the city of Boston aforesaid, and within the judicial district of said court, in and upon certain public grounds of said city within said district, called the "Common," did make a public address, the same not being then and there in accordance with a permit from the mayor of said city; against the peace of said Commonwealth, the form of statute of said Commonwealth, and the revised ordinance of said city in such case made and provided.

A motion to quash was duly filed by the defendant in the said municipal court, and renewed in this court, was overruled by this court, prior to the empannelling of a jury, to which overruling the defendant duly excepted.

Copies of said complaint and motion to quash are hereto annexed and made a part of these exceptions.

On the trial, the Government first produced a duly certified copy of an ordinance for consolidating and arranging the ordinances of the city of Boston; this was contained in the "Revised Ordinances of the City of Boston, 1893," and was published in compliance with section 3 of chapter 1 of said ordinance, chapter 43 therein being put in and read as evidence to the jury as follows: Section 66. No person shall, in or upon any of the public grounds, make any public address, discharge any cannon or firearm, expose for sale any goods, wares, or merchandise, erect or maintain any booth, stand, tent, or apparatus for the purposes of public amusement or show, except in accordance with a permit from the mayor.

9 The Government then called the attention of the court to sections 35 and 39 of chapter 448 of the acts passed in the year 1854, said sections being as follows:

SECTION 35. All other powers heretofore by law vested in the town of Boston or in the inhabitants thereof as a municipal corporation, or in the city council of the city of Boston, shall be and hereby are continued to be vested in the mayor, aldermen, and common council of the said city, to be exercised by concurrent vote, each board, as hereby constituted, having a negative upon the proceedings of the other, and the mayor having a veto power as hereinafter provided.

More especially they shall have power to make all such needful and salutary by-laws and ordinances not inconsistent with the laws of this Commonwealth as towns by the laws of this Commonwealth have power to make and establish, and to annex penalties not exceeding fifty dollars for the breach thereof, which by-laws and ordinances shall take effect and be in force from and after the time therein respectively limited without the sanction or confirmation of any court or other authority whatsoever.

SECTION 39. The city council shall have the care and superintendence of the public buildings, and the care, custody, and management of all the property of the city, with power to lease or sell the same except the Common and Faneuil hall. And the said city council shall have power to purchase property, real or personal, in the name and for the use of the city, whenever its interest or convenience may in their judgment require it.

The Government then offered the following evidence: John W. Little, a police officer, testified that he was a police officer in Boston; that his route as such officer included a part of Boston Common, an open, unenclosed space, a part of the public grounds of Boston; that on Sunday, June 10, 1894, he saw defendant near the band stand, on said Common, and that defendant was preaching, making a public address.

On cross-examination, the witness testified that defendant was preaching what the witness would say was a sermon; that it was between ten and ten thirty a. m., and that he read several passages of Scripture; that defendant's audience numbered from one hundred and fifty to two hundred; that the place where this was done

was a part of the Common about thirty feet distant from the band stand, and a spot where the grass was entirely worn away, and which had been used for three years as a place for public preaching by sundry persons who had been in the habit of preaching at this place under a permit from the mayor of Boston; that there was no disorder or disturbance on the occasion when defendant preached; that the defendant was in the act of preaching when he first noticed him, and he did not interrupt him for fifteen or twenty minutes; that he knew the defendant well, and knew his profession to be that of a minister.

James A. Cross, another police officer of said Boston, corroborated the previous witness generally, on his direct testimony, and on cross-examination stated that what the defendant did was to preach a sermon. Counsel for defendant admitted that he had no permit from the mayor.

Defendant offered no evidence, and no arguments were addressed to the jury.

Upon the foregoing, which was all the evidence in the case, the defendant requested the court to rule and instruct the jury as follows:

1. That there is a variance between the allegation in the complaint and the proof presented by the Government; that the ordinance under which said complaint was made does not apply to the preaching of the gospel, or the delivery of a sermon or religious discourse, and the defendant, by preaching or delivering a sermon or religious discourse on the Common, without permit by the mayor, committed no offence, and that the jury be therefore instructed to return a verdict of not guilty.

2. That said ordinance has not been proved to have been authorized by the constitution and laws of this Commonwealth, and made and recorded and published in conformity with the constitution and laws of this Commonwealth and the revised ordinances of 1892, and therefore said ordinance is invalid and void.

3. That said ordinance invests the mayor of the city of Boston with arbitrary, unregulated, irresponsible, and dictatorial powers, utterly at variance with our principles of government, and subversive of the rights acknowledged and secured to this defendant in and by the Constitution of Massachusetts and of the United States, and especially by the fourteenth amendment of the Constitution of the United States.

4. That said ordinance is not needful and salutary, and is not reasonable; that it is not reasonable as a regulation respecting "the care, custody, and management" of the Common, nor as a regulation in respect to the use of the Common and other public places or grounds, for free public preaching and speaking, and said ordinance is not warranted by the charter of the city of Boston, and said ordinance is without any constitutional and legal authority and sanction, and is null and void.

5. That said ordinance is not a police regulation, needful and reasonable to preserve the public peace, and the city council of Boston had no authority or right to make this ordinance that thereby

the public peace might be preserved, because for every breach of the peace committed or threatened, the "standing laws" of this Commonwealth afford full, complete, and sole protection or redress.

6. That said ordinance is in derogation of the rights secured to the defendant by the bill of rights in the constitution of Massachusetts, and said ordinance is null and void.

7. That it is the duty of the jury, on all the evidence in the case to render a verdict of not guilty for the reasons set forth in these requests and in the motion to quash.

8. That the acts alleged and proved against the defendant constitute no offence for which he is liable under this complaint for the reasons set forth in these requests and in the motion to quash.

11 9. That the defendant had the right to preach a sermon, or make an address, on the Common, as in said complaint he is alleged to have done, provided that he did not disturb the public peace, and did not disturb others; and his liability to punishment under the "standing laws" of this Commonwealth, for disturbing others, or for committing a breach of the peace, would be precisely the same in case he should preach a sermon, or make an address on the Common, having a permit given to him by the mayor of the city of Boston, as would be the defendant's liability in case he should do this, or the like, without the mayor's permit.

10. That said ordinance, and the proceedings under said ordinance, and in enforcement thereof, are in conflict with the Constitution of the United States, and the first section of the fourteenth amendment thereof; that the power given to the mayor of the city of Boston by said ordinance is in derogation of the rights secured to the defendant by said amendment, and said ordinance is null and void.

11. That said ordinance, and its enforcement, and the use of said ordinance, and the manner of its enforcement, have been and are prohibitory, partial, unequal, and unjust; that said ordinance has been solely used to hinder, hamper, and prevent, and prohibit the peaceful free public preaching of the gospel, in proper public places in said Boston, by competent and reputable Christian ministers; while many other persons, having no permit to do so, have spoken to large numbers of persons, upon the public grounds, squares, and streets of said Boston, and when the public peace has been thereby disturbed, threatened, and endangered; and yet no one of the last-named persons, though well known to the police and other officers of said Boston, has ever been complained of for the violation of said ordinance; therefore said ordinance is not reasonable, but it is unreasonable, null and void.

The court refused to give any of the instructions requested, and submitted the case to the determination of the jury.

The jury returned a verdict of guilty. The counsel for the defendant stated that he made no objection to the form of the complaint.

To the overruling of said motion to quash, and to each and all

of the refusals to rule as hereinbefore set forth, the defendant duly excepted, and prays that his exceptions may be allowed.

WILLIAM F. DAVIS,
By his attorney, J. W. PICKERING.

Oct. 23, 1894.
Exceptions allowed.

FRANKLIN G. FESSENDEN,
Justice of the Superior Court.

12 *Defendant's Motion to Quash Complaint.*

And now comes said defendant and moves that said complaint be quashed, and for the following reasons, to wit:

First. Because said complaint sets forth no offence in conformity with the requirements of the statutes of this Commonwealth.

Second. Because said complaint contains no averment that the making of the address alleged did disturb the public peace, or did interfere with or obstruct others, or did threaten so to do.

Third. Because there is not any valid and constitutional law, statute, or ordinance of said city, or any valid or constitutional law of said Commonwealth, by virtue of which said complaint can be made and maintained.

Fourth. Because the by-law or ordinance under which said complaint was made is in derogation of and violates the rights of the defendant, and especially as secured to him and all the people of this Commonwealth, by the bill of rights in the constitution of this State, and in the second (2), tenth (10), eighteenth (18), and nineteenth (19) sections thereof.

Fifth. Because the by-law or ordinance under which said complaint was made is subversive of and violates the rights secured to the defendant and to all citizens of the United States, by the provisions of section one (1) of article fourteen (14), of the amendments of the Constitution of the United States.

Sixth. Because the said by-law or ordinance under which said complaint was made invests the mayor of the city of Boston with arbitrary and despotic power, adverse to and subversive of the equal and just rights of the citizens of this State and of the United States, and denies to this defendant the equal protection of the laws as secured to him and all citizens of this State and of the United States by the provisions of section one (1) of article fourteen (14) of the amendments of the Constitution of the United States.

Seventh. Because said by-law or ordinance is unreasonable, unnecessary, and useless for the preservation of the public peace, and the existence and the enforcement of said by-law or ordinance tend to provoke disturbance and breaches of the peace, by arbitrary and oppressive denial of equal rights and equal protection of the law; and said by-law or ordinance is unconstitutional and void.

And it violates the constitution of this State and the Constitution of the United States, and article one (1) in addition to and amendment of the Constitution of the United States, and article fourteen in amendment of same.

By his attorney, J. WINTHROP PICKERING.

13 *Complaint.*

To the justices of the municipal court of the city of Boston, holden at said Boston, for the transaction of criminal business within the county of Suffolk:

John W. Little, of the city of Boston, in the county of Suffolk, police officer, in behalf of the Commonwealth of Massachusetts, on oath complains that William F. Davis, of said city of Boston, on the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-four, at the city of Boston aforesaid, and within the judicial district of said court, in and upon certain public grounds of said city, within said district, called the "Common," did make a public address; the same not being then and there in accordance with a permit from the mayor of said city; against the peace of said Commonwealth, the form of the statute of said Commonwealth, and the revised ordinance of said city, in such case made and provided.

JOHN W. LITTLE.

CITY OF BOSTON, *To wit:*

Taken and sworn to, this eleventh day of June, in the year of our Lord one thousand eight hundred and ninety-four, before said court.

ARTHUR P. HARDY,
Assistant Clerk.

A true copy.
Attest: FRED. C. INGALLS, *Clerk.*

Said complaint was thence continued from term to term to the January term, A. D. 1895, when a rescript was received from said supreme judicial court, and said rescript is as follows:

14 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, January, 1895.

In the case of—

COMMONWEALTH
vs.
WILLIAM F. DAVIS.

Pending in the superior court for the county of Suffolk.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Exceptions overruled.

By the court:

HENRY A. CLAPP, *Clerk.*

January 1, 1895.

15 *Brief Statement of the Grounds and Reasons of the Decision.*

The ordinance is constitutional and authorized.
St. applies to sermons on the Common.
See opinion H.

The following are the opinions of the supreme judicial court for the Commonwealth of Massachusetts :

16 COMMONWEALTH OF MASSACHUSETTS,
BOSTON, *February* 1, 1895.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Commonwealth *vs.* Davis, decided on the 1st day of January, 1895.

GEO. F. TUCKER,
Reporter of Decisions.

17 HOLMES, *J.* :

The only question raised by these exceptions which was not decided in the former case of Commonwealth *vs.* Davis, 140 Mass., 485, is one concerning the construction of the present ordinance. That such an ordinance is constitutional is implied by the former decision and does not appear to us open to doubt. To say that it is unconstitutional means that even if the legislature has purported to authorize it the attempt was vain. The argument to that effect involves the same kind of fallacy that was dealt with in McAuliffe *v.* New Bedford, 155 Mass., 216. It assumes that the ordinance is directed against free speech generally (as in Des Plaines *v.* Boyer, 123 Ill., 348, the ordinance held void was directed against public picnics and open-air dances generally), whereas in fact it is directed toward the modes in which Boston Common may be used.

18 There is no evidence before us to show that the power of the legislature over the Common is less than its power over any other park dedicated to the use of the public or over public streets the legal title to which is in a city or town. Lincoln *v.* Boston, 148 Mass., 578, 580. As representative of the public it may and does exercise control over the use which the public may make of such places, and it may and does delegate more or less of such control to the city or town immediately concerned. For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary rights interfere the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes. See Dillon, Mun. Corp., §§ 393, 407, 651, 656, 666; Brooklyn Park Commissioners *v.* Armstrong, 45 N. Y., 234, 243, 244.

If the legislature had power under the constitution to pass a law in the form of the present ordinance there is no doubt that it could

authorize the city of Boston to pass the ordinance, and it is settled by the former decision that it has done so. As matter of history, we suppose there is no doubt that the town, and after it the city, always has regulated the use of the Common except so far as
19 restrained by statute. It is settled, also, that the prohibition in such an ordinance, which would be binding if absolute, is not made invalid by the fact that it may be removed in a particular case by a license from a city officer or a less numerous body than the one which enacts the prohibition. Commonwealth *v.* Ellis, 158 Mass., 555, 557, and cases cited. It is argued that the ordinance really is directed especially against free preaching of the gospel in public places, as certain Western ordinances, seemingly general, have been held to be directed against the Chinese; but we have no reason to believe and do not believe that this ordinance was passed for any other than its ostensible purpose, namely, as a proper regulation of the use of public grounds.

It follows that, as we said at the outset, the only question open is the construction of the present ordinance. We are of opinion that the words "No person shall make any public address" in the Revised Ordinances of 1892, c. 43, § 66, have as broad a meaning as the words "No person shall deliver a sermon, lecture, address, or discourse" in the Revised Ordinances of 1883, c. 37, § 11, under which Commonwealth *v.* Davis, 140 Mass., 485, was decided. See Rev. Ord., 1885, c. 42, § 11. Whether lecture, political discourse, or sermon, a speech on the Common addressed to all persons who choose to draw near and listen is a public address, and the omission of the superfluous words in the last revision was only a matter of style and the abridgement properly sought for in codification.

Exceptions overruled.

20 [Endorsed:] Commonwealth *vs.* Davis. Certified copy of the opinion of the supreme judicial court.

21 Afterward, during said January term, the said Davis was set at the bar of said superior court to receive sentence.

It was therefore considered by said superior court that said Davis, for his offence, as set forth in said complaint, pay a fine of twenty dollars and costs to the amount of thirty dollars, and that he stand committed to the common jail in said county until said sentence be complied with.

Thereupon a warrant was duly issued to commit said Davis to said jail upon said order, and said Davis was committed to said jail by virtue of said warrant, and said warrant, with the return thereon, is as follows:

22 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *To wit:*

To the sheriff of our county of Suffolk, his deputies, the [L. S.] officers of the court hereinafter named, and to the keeper of our common jail, in said county, Greeting:

Whereas William F. Davis, of said Boston, now stands convicted before the superior court for the transaction of criminal business, within and for the county of Suffolk, of the crime of making a public address upon certain public grounds, to wit, the "Common," without a permit from the mayor of said city of Boston, committed at Boston aforesaid, for which offence he, the said Fine .. $20 Davis, is by said court sentenced to pay a fine of Costs .. 30 twenty dollars and costs of prosecution to the amount —— of thirty dollars, for the use of said county, and to $50 stand committed to said jail until this sentence be performed, all of which sentence he, the said Davis, now, before said court, refuses to comply with:

We therefore command you, the said sheriff, deputies, officers of said court, and each of you, forthwith to convey the said Davis to the common jail in the county aforesaid, and to deliver him to said keeper, and make return of this precept, with your doings thereon, and you, the said keeper, are hereby in like manner commanded to receive the said Davis (whom we herewith send) into your custody in said jail, and him there safely to keep until he shall comply with said sentence or be otherwise discharged by due course of law.

Witness Albert Mason, Esquire, chief justice, at Boston aforesaid, this twenty-fourth day of January, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN P. MANNING, *Clerk.*

23 [Endorsed:] No. —. Commonwealth *vs.* —— ——. Warrant for non-payment. To jail.

Return.

SUFFOLK, *To wit:*

CITY OF BOSTON, *January 24th*, 1895.

In obedience to the within warrant, I have conveyed the within-named William F. Davis to the jail in said county and delivered him to the keeper thereof, with a copy of this warrant.

WM. G. TYLER,
Deputy Sheriff.

Fees.

Copy	25
Service	30
Travel	10
	65

24 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said court to be hereto affixed.

Witness Albert Mason, chief justice of our said superior court, at said Boston, this sixth day of February, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN P. MANNING, *Clerk.*

The following is the application for the writ of error and the assignment of errors:

25 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Superior Court for the Transaction of Criminal Business.

To the Honorable Albert Mason, chief justice of the superior court:

The defendant complains that errors of law appear in the record of the above-entitled matter and respectfully petitions for a writ of error to the Supreme Court of the United States, and that you will issue a citation to the Commonwealth of Massachusetts, and herewith files his assignment of errors as follows:

1. The court erred in overruling defendant's motion to quash the complaint.

2. The court erred in refusing to rule at the trial of said case, as requested by the defendant (as shown by his exceptions duly filed and allowed in this case), that said ordinance invests the mayor of the city of Boston with arbitrary, unregulated, irresponsible, and dictatorial power, utterly at variance with our principles of government and subversive of the rights acknowledged and secured to this defendant in and by the constitution of Massachusetts and of the United States, and especially by the fourteenth amendment of the United States.

3. The court erred in refusing to rule at the trial of said case, as requested by defendant (and as shown by his exceptions duly filed and allowed in said case), that said ordinance is not needful and salutary and is not reasonable; that it is not reasonable as a
26 regulation respecting the care, custody, and management of the Common and other public places and grounds for free public preaching and speaking, and said ordinance is not warranted by the charter of the city of Boston, and said ordinance is without any constitutional and legal authority and sanction and is null and void.

By his attorney—

J. W. PICKERING.

27 The foregoing application was allowed by the chief justice of said superior court, and said Davis was ordered by said superior court to furnish a bond, with sureties, in the sum of two hundred dollars to prosecute said writ in said Supreme Court of the United States, and said Davis furnished said bond as required.

Said Davis was also ordered by said superior court to furnish a second bond, with sureties, in the sum of two hundred dollars for his appearance further before said superior court to answer to said judgment of said superior court in case said writ was decided against him, and said Davis furnished said bond as required, and said Davis was discharged from custody in said jail to await the determination of said writ of error.

28 The following is the original citation and acknowledgment of service:

29 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Superior Court for the Transaction of Criminal Business.

To the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to appear in the Supreme Court of the United States, on the second day of March next, pursuant to a writ of error filed in this court, wherein William F. Davis is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Albert Mason, chief justice of the said superior court, this second day of February, in the year of our Lord one thousand eight hundred and ninety-five.

[Seal of the Superior Court.]

ALBERT MASON.

Boston, February 5, 1895.

Due service of the foregoing citation is hereby acknowledged.

H. M. KNOWLTON, *Att'y Gen'l.*

30 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

I, John P. Manning, clerk of said superior court for the transaction of criminal business within and for the said county of Suffolk, do hereby certify that the foregoing are true copies of the record in the case of Commonwealth *vs.* William F. Davis, the application for the writ of error and assignments of error, the opinion of the supreme judicial court of said Commonwealth, all annexed to and transmitted with the record, and of all the proceedings in the case, with all things concerning the same, together with the original writ, citation, and acknowledgment of service thereon.

In testimony whereof I hereunto set my hand and affix the seal of said superior court, at said Boston, this sixth day of February, in the year of our Lord one one thousand eight hundred and ninety-five.

Seal of the Superior Court

JOHN P. MANNING, *Clerk.*

31 *Bond on Writ of Error.*

Know all men by these presents that we, William F. Davis, of Boston, Suffolk county, and Commonwealth of Massachusetts, as principal, and Jackson Lynas, of Dedham, in the county of Norfolk, and Thomas Craig, of Milton, in the county of Norfolk, in said Commonwealth, as sureties, are held and firmly bound unto the Commonwealth of Massachusetts in the full and just sum of two hundred dollars, to be paid to the said Commonwealth of Massachusetts; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the second day of February, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a hearing before the superior court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, for the transaction of criminal business, in a suit pending in said court between The Commonwealth of Massachusetts, by complaint, against William F. Davis, judgment was entered against the said William F. Davis, and the said William F. Davis having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Massachusetts, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second day of March next:

Now, the condition of the above obligation is such that if
32 the said William F. Davis shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

WM. F. DAVIS. [L. S.]
JACKSON LYNAS. [L. S.]
THOMAS CRAIG. [L. S.]

Signed, sealed, and delivered in presence of—

J. W. PICKERING,
To All Three.

Feb. 6, 1895.

Approved:

ALBERT MASON,
Chief Justice of Superior Court.

A true copy of the bond taken by the chief justice at the time of allowing the writ of error named in said bond is on file in the office of the clerk of the superior court for the transaction of criminal business within and for the county of Suffolk.

Attest:

[Seal of the Superior Court.]

JOHN P. MANNING,
Clerk of Superior Court Aforesaid.

Endorsed on cover: Case No. 15,801. Massachusetts superior court, Suffolk county. Term No., 229. William F. Davis, plaintiff in error, *vs.* The Commonwealth of Massachusetts. Filed February 20th, 1895.

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167-43
Office Supreme Court, U. S.
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JAMES H. MCKENNEY
Clerk.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1896.

NO. 229.

WILLIAM F. DAVIS, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS.

BRIEF OF JAMES F. PICKERING,

FOR PLAINTIFF IN ERROR.

BOSTON:
TWITCHELL & HIGHT, PRINTERS,
319 Washington Street,
1897.

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IN ERROR TO THE SUPERIOR COURT OF THE COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS.

BRIEF OF JAMES F. PICKERING,

FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error calls in question the validity of an ordinance made by the City Council of Boston in the Commonwealth of Massachusetts, to wit:

REVISED ORDINANCES OF 1892, p. 112.

"SECT. 66. No person shall, in or upon any of the public grounds, make any public address, discharge any cannon or firearm, expose for sale any goods, wares or merchandise, erect or maintain any booth, stand, tent, or apparatus for purposes of public amusement or show, except in accordance with a permit from the Mayor."

This is an amended ordinance, and formerly was in these words: "No person shall, except by the permission of the said committee,

deliver a sermon, lecture, address, or discourse on the common or other public grounds." Revised Ordinances, 1883, Chap. 87, Sect. 11. "The said committee," was "a committee of the City Council, having charge of the common and public grounds." *Ib.* Sect. 5.

It was under this revised ordinance of 1883 that the complaint in Commonwealth *vs.* Davis, 140 Mass. 485, was made.

This ordinance as originally made by the City Council of Boston, January 4, 1862, was: "No person shall deliver any sermon, lecture, address, or discourse on the common, puplic garden, public squares, or common lands of the city without the permission of the mayor and aldermen."

The power which at first was vested in the mayor and aldermen, and afterwards reposed in a committee of the City Council, is now conferred on *the mayor alone.*

This ordinance specifies no conditions on which the mayor's permit may be granted, and it requires no compliance with any rules or regulations, but it confers on the mayor a power wholly personal, arbitary and autocratic, — a power prohibited by the Constitution of Massachusetts, and by Article 1 of the 14th Amendment of the Constitution of the United States.

By this Revised Ordinance of 1892, preachers of the Gospel are improperly and unjustly placed in the same class or category with the users of the public grounds for purposes of trade, for public amusement or show, and for other like uses and purposes. But the sole intent and purpose of this ordinance, as its original form and revisions, as well as its enforcement show, was, and is, to prohibit the free public preaching of the Gospel in the City of Boston.

The plaintiff in error, a regularly ordained minister, having preached the Gospel on Boston Common, on Sunday, without "a permit from the mayor," was prosecuted under said Revised Ordinance of 1892, and convicted, and said conviction was affirmed by the Supreme Judicial Court of Massachusetts,— to reverse which, this Writ of Error has been brought to this Honorable Court.

SPECIFICATION OF ERRORS.

The Plaintiff in Error specifies the following errors:

1. That "the court erred in overruling defendant's (plaintiff in error) motion to quash the complaint." See pp. 3, 4 and 8 of printed Transcript of Record.

2. That the court erred in overruling paragraph "Fifth," in said

motion ; "Because the by-law or ordinance under which said complaint was made is subversive of and violates the rights secured to the defendant and to all citizens of the United States, by the provisions of section one (1) of article fourteen (14) of the Amendments of the Constitution of the United States"; and also, paragraph "Sixth, Because the said by-law or ordinance under which said complaint was made invests the mayor of the City of Boston with arbitrary and despotic power, adverse to and subversive of the equal and just rights of the citizens of this State and of the United States, and denies to this defendant the equal protection of the laws as secured to him and all citizens of this State and of the United States by the provisions of section one (1) of article fourteen (14) of the Amendments of the Constitution of the United States"; and also, paragraph "Seventh, Because said by-law or ordinance is unreasonable, unnecessary, and useless for the preservation of the public peace, and the existence and enforcement of said by-law or ordinance tends to provoke disturbances and breaches of the peace, by arbitrary and oppressive denial of equal rights and equal protection of the laws ; and said by-law or ordinance is unconstitutional and void, and it violates the constitution of this State and the Constitution of the United States, and article one (1) in addition to and Amendment of the Constitution of the United States, and article fourteen in amendment of same."

3. That the court erred in refusing to rule at the trial of said case as requested by the defendant, "That said ordinance invests the mayor of the City of Boston with arbitary, unregulated, irresponsible and dictatorial power, utterly at variance with our principles of government and subversive of the rights acknowledged and secured to this defendant in and by the Constitution of Massachusetts and of the United States, and especially by the fourteenth Amendment of the Constitution of the United States."

4. That the court erred in refusing to rule,— "That said ordinance is not needful and salutary, and is not reasonable ; that it is not reasonable as a regulation respecting 'the care, custody, and management' of the Common, nor as a regulation in respect to the use of the Common and other public places or grounds, for free public preaching and speaking, and said ordinance is not warranted by the charter of the City of Boston, and said ordinance is without any constitutional and legal authority and sanction, and is null and void."

See "Transcript of Record," p. 6 ; 3, 4, and p. 7 ; 10, 11.

POINTS, AUTHORITIES, AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

I.

That said ordinance, — arbitary, oppressive, and unconstitutional, — violates the rights of free public speech, of free assembly, and of free public religious worship, which are the gifts of nature and of God, which government did not give and cannot take away, and which are indispensable to the promulgation of the Gospel as commanded by Christ, and to the maintenance of a republican form of government as guaranteed by the constitution of the United States; and that said ordinance is in derogation and violation of the rights secured to the citizens of the United States, and to this defendant, by the Fourteenth Amendment of the constitution of the United States, has been well established by the decisions in:

Re Frazee, 63 Mich. 395.
Anderson *v.* Wellington, 40 Kan. 173; 2 L. R. A. 110.
Crawford *v.* Topeka, 51 Kan. ——; 20 L. R. A. 692.
Chicago *v.* Trotter, 136 Ill. 430.
Rich *v.* Naperville, 42 Ill. App. 222.
Baltimore *v.* Radicke, 49 Md. 217.
State *v.* Hughes, 72 N. C. 25.
Re Garrabad, 84 Wis. 585; 19 L. R. A. 858.
Chariton *v.* Fitzsimmons, 87 Iowa, 226; 54 N. W. 146.
City *v.* Schuetheis, Ind. 35 N. E. Rep. 12.
City *v.* Dudley, Ind. 28 N. E. Rep. 312.
Yick Wo *v.* Hopkins, 118 U. S. 356; 30 L. ed. 220.
Yates *v.* Milwaukee, 77 U. S. 497. 19 L. ed. 984.
In re Wong Yung Qui, The Reporter, vol. 9; 366.
In re Quong Woo, The Reporter, vol. 14; 417.
In Ex parte Sing Lee, 96 Cal. 354, 24 L. R. A. 195.
People *v.* Armstrong, Mich. 41 N. W. Rep. 275.
State *v.* Hammond, Minn. 41 N. W. Rep. 243.
People *v.* Rochester, 44 Hun. 166.
People *v.* Gillson, 109 N. Y. 389; 12 Cent. 616.
Leep *v.* St. Louis & C. R. Co. 58 Ark. 407; 23 L. R. A. 264.
St. Louis *v.* Hill, 116 Mo. 527. 21 L. R. A. 226.
State *v.* Loomis, 115 Mo. 307; 21 L. R. A. 789, note.
Rippe *v.* Becker, 56 Minn. 100, 22 L. R. A. 857.
Lowry *v.* Rainwater, 70 Mo. 152; 35 Am. Rep. 420.
Parsons *v.* Russell, 11 Mich. 113.

State *v.* Fiske, 9 R. I. 94.
State *v.* Mott, 61 Md. 297; 48 Am. Rep. 105.
St. Louis *v.* Russell, 20 L. R. A. 721. *Note.*
Commonwealth *v.* Turner, 1 Cush. 493.
Commonwealth *v.* Stodder, 2 Cush. 562.
Austin *v.* Murray, 16 Pick. 121.
Fisher *v.* McGirr, et. als., 1 Gray 1.
Cushing *v.* Boston, 128 Mass. 330.
Wilkins *v.* Jewett, 139 Mass. 29.
Morse *v.* Stocker, 1 Allen 150.
Boston *v.* Shaw, 1 Met. 130.
Dillingham *v.* Snow, 5 Mass. 547–553.
Stetson *v.* Kempton, 13 Mass. 272.
N. O. Gas Light Co. *v.* La. Light Co. 115 U. S. 650; 29 L. ed. 520.
Henderson, &c. *v.* Mayor of New York, 92 U. S. 263; 23 L. ed. 543.
Chy Lung *v.* Freeman, 92 U. S. 276; 23 L. ed. 550.
McCullough *v.* Brown, 41 S. C. 220; 23 L. R. A. 410.
People *v.* Minn., 13 Wst. Rep. 487.
Kuhm *v.* Common Council, &c. 14 West. Rep. 478.
Lawton *v.* Steele, 152 U. S. 133; 38 L. ed. 385.
State *v.* Vineland, 56 N. J. L. (27 Vroom,) 474; 23 L. R. A. 685.
State *v.* Elizabeth, 56 N. J. L. (27 Vroom,) 71; 23 L. R. A. 525.
Wadsworth *v.* Union Pac. R. Co., 18 Colo. 600; 23 L. R. A. 812.
People, *ex. rel.* Copcutt *v.* Yonkers, 140 N. Y. 1; 23 L. R. A. 481.
Ho Ah Kon *v.* Nunan, 5 Sawy. 552; 8 Rep. 195; 57 Cal. 604.
Millett *v.* People, 117 Ill. 294.

II.

Said ordinance not only authorizes, but it requires unreasonable and inevitably unjust discrimination respecting preachers, as such, or as a class, and this, because its enforcement is without any rule, regulation, or reason to guide, or conditions to regard.

The enforcement of this ordinance, (unlike the *statute* in Lowe *v.* State of Kansas, 163 U. S. 81; 41 L. ed.—) *does* and *must* "subject

the individual to an arbitrary exercise of power," and *it has* "denied him the equal protection of the laws."

If (as has been mistakenly said,) anybody and everybody who will *ask* may have a "permit," then this ordinance demands that which is oppressive, unreasonable and useless, and it is a nullity; but, if any of those who ask are or may be refused when equally worthy and entitled with those permitted, (which is the actual and inevitable case,) then the operation of this ordinance is special, partial, unequal, arbitrary, anti-republican and unconstitutional.

The mayor can receive no guarantee or assurance that those to whom he grants his permit will not disturb the public peace, nor injure the public grounds, and that the preaching and speaking of those whom he permits will not tend to cause disturbance or damage equally, at least, with the preaching and speaking of those to whom his permit is refused.

This ordinance imposes an extraordinary and burdensome requirement upon one of the numerous classes of persons entitled to use the Common, and public grounds, and deprives this class of the equal and just protection of the law; it is therefore unconstitutional and void.

See cases above cited.

A law is not general because it operates upon all within a class, unless there is a substantial reason why it is made to operate upon that class only, and not generally upon all.

Ex parte Jentzsch, (Cal.) 32 L. R. A.; 44 Pac. Rep. 803.

"An ordinance to be valid must leave no discretionary power vested in the officer whose duty it is to execute it. The ordinance must specify the condition on which the license if any is required, should be granted, and the officer should merely be intrusted with the duty of issuing the license to all who comply with the conditions."

State *v.* Tenant, 15 L. R. A. 423; 10 N. C. 609.
State *v.* Hunter, 8. L. R. A. 529; 106 N. C. 796. 107 N. C. 962.
Bills *v.* Goshen, 3 L. R. A. 261; 117 Ind. 221.
Yick Wo *v.* Hopkins, 118 U. S. 356; 50 L. ed. 220.
Baltimore *v.* Radicke, 49 Md. 217.
Richmond *v.* Dudley, 13 L. R. A. 587; 129 Ind. 112.
Newton *v.* Bleger, 143 Mass. 598.
Anderson *v.* Wellington, 2 L. R. A. 110; 40 Kan. 173.

Sioux Falls *v.* Kirby, — S. D. — 25 L. R. A. 621.
May *v.* People, 1 Colo. App. 157.
Tugman *v.* Chicago, 78 Ill. 405.

And cases cited under Point I.

"Discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed *by rule*, not by humor. It must not be arbitrary, vague and fanciful, but legal and regular."

Lord Mansfield, C. J., in Rex *v.* Wilkes, 4 Burr. 25–39.

"Discretion *without rule* ceases to be law, and becomes a most dangerous and tremendous power." Per. Duncan, J., in Witman *v.* Ely, 4 S. & R. 265.

In Rex *v.* Young, *et al.*, 1 Burr. 563, Lord Chief Justice Mansfield said: "For though the justices have, it is true, a discretion in these cases, yet, it must not be permitted to them to exercise an *arbitrary and uncontrolled power* over the rights of other people and in cases where their livelihoods are essentially concerned."

III.

The thing done by the plaintiff in error, in itself, was a proper, fit and suitable thing to do,— a very needful and beneficial thing to do, and equally so, whether done with or without a permit.

The contention that the mayor of Boston may "permit" public preaching of the Gospel proves the fitness, propriety, and need of such preaching.

Boston Common, and the place where the plaintiff in error delivered his sermon or public address, was a fit, suitable, and proper place for such speaking; and this fact is admitted and proved by such authorized use of the Common "with a permit from the mayor."

Now, the doing of this *proper thing*, in this *proper place*, is, first of all, PROHIBITED TO ALL PREACHERS, and speakers, and then, the mayor is empowered, in the exercise of his arbitrary, personal will,— subject to no rule of action, to *grant his permit to whom he will, and withhold it from whom he will.*

By this ordinance there is set up in the City of Boston a *censorship of preachers and preaching*, and of *all* free public speaking in public places, and *the mayor is made sole censor.*

The enforcement of this ordinance clearly violates the constitution of the United States, and especially the Fourteenth Amend-

ment. It is *anti-republican*, and it dispenses with and *abolishes* "due process of law."

Neither the Czar of Russia, nor the Sultan of Turkey, can exercise a more arbitrary and despotic power than by this ordinance is conferred on the mayor of Boston acting within its scope; and the same principle on which this ordinance is based, warrants other ordinances and actions equally despotic with alleged acts of the Sultan, to prevent or punish which many of our people would have this government take forcible action.

Are we more moved by violations of liberty abroad than by those we enact or tolerate at home?

By said ordinance the plaintiff in error is deprived of his liberty, and of his constitutionally secured rights, "without due process of law,"—without *any* process of law.

IV.

Boston Common is the property of the inhabitants of the City of Boston, and dedicated to the use of the people of that city and the public in many ways, and the preaching of the Gospel there, has been from time immemorial to a recent period, one of these ways. For the making of this ordinance in 1862, and its enforcement against preachers since 1885, no reason whatever has been or can be shown.

That good and not evil, benefit and not injury, had always resulted from this use of Boston Common, is undeniable and an uncontroverted fact. And yet, those who would continue this pious and beneficial use of the Common and public grounds, are classed in this ordinance with costermongers,—apple, candy, and lemonade sellers,—with Punch and Judy, and those who would improperly use cannon or firearms, as well as speakers on all sorts of secular subjects. The evident purpose of this classification, is to cloud and obscure the real object and aim of this ordinance, and give false color to an argument in favor of its validity.

This ordinance applies to but a few of the many users of the Common and public grounds,—a few of the many classes of users. Whether all of those prohibited shall be regarded as *one* class, or as three or even four classes, the objections here urged against this ordinance are valid.

Can it with any reason be claimed that, in Boston, there exists a particular and special danger of breaches of the peace, and injury to the public grounds from preaching of the Gospel? Are preachers so peculiarly apt to cause these offences that they must be prevented

from doing so by prohibiting them as a class,—or as one of certain bodies of men constituted a class by this ordinance,—from preaching or speaking on the Common and public grounds of Boston,—except by the mayor's permit?

But if this is the character of our preachers, why should they not be altogether excluded from the Common and public grounds?

If, however, they are bent on disturbing the peace or injuring the public grounds, they may easily effect this evil purpose, without preaching a sermon or making a "public address" there.

V.

In case a permitted or unpermitted person causes a breach of the peace or injury to the public grounds, such person may be prosecuted for violating the law of the State, but he cannot be prosecuted therefor under this ordinance, and in a prosecution for the violation of this ordinance, no question touching the "peace" or the "public grounds" can be put in issue.

It has been held that an indictment and conviction for an offence against a city ordinance is no bar to an indictment under a State law, though the self-same act constitutes the offence in both cases. Kemper *v.* Com. (Ky.), 3 S. W. Rep. 159.

This being the law, the plaintiff in error, if this Boston ordinance be valid, may be twice tried and twice punished for the same and single offence.

The overt act, — a "breach of the peace" or "injury to the public grounds," — is punished as a violation of the law of the State; and the failure to be deterred or prevented from committing the overt act, — not by the law, but by the ordinance, — renders the miserable offender liable to another and double punishment.

More than this, when there has been no intention to commit or cause any overt act, and where the action prohibited had no tendency to any overt act, — as was the fact in the case at bar, — the violator of the ordinance is liable to punishment.

This ordinance is but a device to double the punishment for wrongs done, and to punish where no wrong is done or threatened.

VI.

This ordinance is a prohibition against preachers of the Gospel, and makes preaching a misdemeanor, and condemns it as calculated

to disturb the public peace, and cause injury to property, — and this, in face of the fact that it is to the free public preaching of the Gospel that we owe our peace and the preservation of our property.

And by this ordinance, preachers are put down with itinerant venders, fakirs, fun-makers, and secular speakers.

But the rights, privileges, immunities, and liberties of preachers of the Gospel, are not less, nor less to be safeguarded, than are the rights of business men, and the owners of property.

The plaintiff in error asks no more than that the same sound rules and principles of law be applied in this case of Personal Right and Christian Liberty, that have been applied in numerous cases in the courts of last resort in many of the States, and in this Court, when questions respecting rights in property and business have been in issue, a few of which cases are cited in this brief.

The City Council of Boston did not give this ordinance even the "guise of regulating" anything; but it asserts the power to take away the most sacred constitutionally secured and regulated rights of a class, or classes, of the people.

Even a State, cannot "under guise of a regulation," or exercise of the "Police Powers," bring about destruction and confiscation of property, or rights in property, belonging to a corporation, or to an individual

Are the personal rights and liberties which are secured and the exercise thereof regulated in our State and National Constitutions to be dealt with in a manner which would not be applied to matters of business, money-making, and property?

Shall there be one rule for the rights of property, and another rule for the Rights of Man?

In the able dissenting opinion of Mr. Justice Field, given in the Slaughter House cases, 83 U. S. 36 [21-395], he said, — "But under the pretence of prescribing a police regulation, the State cannot be permitted to encroach upon any of the just rights of the citizen, which the constitution intended to secure against abridgement." And he quotes from the Cong. Globe 1st. Sess. 39 Cong. part 1, p. 474 (Speech of Senator Trumbull, who drew the Civil Rights Act) "I take it that any statute which is not equal to all, and which deprives any citizen of civil rights, which are secured to other citizens, is an unjust encroachment upon his liberty; and it is a badge of servitude which by the constitution is prohibited." * * * "This equality of right, with exemption from all disparaging and partial enactments in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere all pursuits, all professions, all avoca-

tions are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition."

Mr. Justice Bradley in his dissenting opinion, in the same case, said: "A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and claim citizenship therein, and an equality of right with every other citizen, and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace as a means of enjoying all the rights and privileges enjoyed by other citizens. * * * If a man is denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States. * * * The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves * * *

"In this free country, the people of which inherited certain traditionary rights and privileges from their ancestors, citizenship meant something. It has certain privileges and immunities attached to it which the government, whether restricted by express or implied limitations cannot take away or impair. * * * The people of this country brought with them to its shores the rights of Englishmen. * * * Rights to life, liberty and the pursuit of happiness are equivalent to the rights of life, liberty and property. * * * For the preservation, exercise and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman."

"Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. * * * The word 'religion' is not defined in the constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times, in the midst of which the provision was adopted. The precise point of the inquiry is: What is the religious freedom which has been guaranteed? * * * In the preamble of this act (12 Hening's Stat. 84), religious freedom is defined, and after a recital, 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty;' it is declared, 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.' In these two sentences is found the true distinction between what properly belongs to the church and what to the State." *Chief Justice* Waite, in Reynolds *v.* United States, 98 U. S. 145;—25:244.

"The theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial

branches of these governments are all of limited powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." *Mr. Justice* Miller, in Savings and L. Association *v.* Topeka, 87 U. S. 665, L. ed. 22, 455, 461.

"The power of communication of thoughts and opinions is the gift of God, and the freedom of it is the source of all science, the first fruits and the ultimate happiness of society; and therefore it seems to follow, that human laws ought not to interpose, to prevent the communication of sentiments and opinions in voluntary assemblies of men." Lord Mansfield, C. J., quoted, 32 Parl. Hist. 318.

"All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. If the constitutional guaranty extends no farther than to prevent a deprivation of title and possession, and allows a deprivation of use, and the fruits of that use, it does not merit the encomiums it has received." *Mr. Justice* Field, in Munn *v.* Illinois, 94 U. S. 141.

"The right of the people, peaceably to assemble for lawful purposes, existed long before the adoption of the constitution of the United States. In fact it is and always has been one of the attributes of citizenship under a free government." *Chief Justice* Waite, in United States *v.* Cruikshank, 92 U. S. 588; 20, L. ed. 542.

"This power to regulate is not the power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." *Chief Justice* Waite, in Stone *v.* Farmer's Loan and T. Co., 116 U.S. 307, 331; L. ed. 29:636, 644 has been quoted and adopted in Dow *v.* Beidelman, 125 U. S. 680, 689, 31 L. ed. 841, 843, in Chicago, M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 458, 33 L. ed. 970, 981, and by *Mr. Justice* Brewer in Reagan *v.* Farmer's Loan & T. Co., 154 U. S. 362; 38 L. ed. 1014.

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the elements of *reasonableness*, both as regards the company and as regards the public, is eminently a question for *judicial* investigation, requiring the process of law for its determination." *Mr. Justice* Blatchford, in Chicago M. and St. P. R. Co. *v.* Minnesota, *supra.*

"The equal protection of the laws which by the 14th amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held." *Mr. Justice* Brewer, in Farmer's L. & T. Co., *supra.* *Vide* p. 399 in 154 U. S. and 38 L. ed. 1024.

In Portland *v.* Bangor, 65 Me. 120, it was held that the Statute of that State which authorized two or more overseers of the poor, by a writing under their hands, to admit to the workhouse tramps, and

vagrants, is in violation of the Fourteenth Amendment of the Constitution of the United States ; that the *ex parte* determination of overseers of the poor is not "due process of law."

In Gross *v.* Rice, 71 Me. 241, it was held that a statute which provides that no convict shall be discharged from State Prison until he has remained the full term for which he was sentenced, excluding the time he may have been in solitary confinement for violation of the rules and regulations of the prison, is in derogation of the constitutional provision that a man shall not be deprived of his *liberty* without "due process of law," and therefore void.

King *v.* Hayes,—Me.—was an action of trespress for killing a horse. The defendant justified, and answered that he had strictly followed the provisions of Maine's Rev. Stats.; but the Court said :— "We are of opinion that so much of the provisions of Rev. Stat. Chap. 124, § 42, as allowed the defendant to condemn, conclusively fix the value of, and destroy the defendant's horse without any notice, actual or constructive to the owner, in order that he might be heard, is in violation of the fundamental law, which prohibits any person from being deprived of his property *without due process of law.* Dum *v.* Burleigh, 62 Me. 24. Such have been the adjudications even in regard to the destruction of intoxicating liquors intended for sale. Fish *v.* McGirr, et. als., 1 Gray, 1."

See also Wilder *v.* Chicago & C. R. Co. 14 West, Rep. 627.

In People *ex rel.* Hinckley *v.* Piepenbrink, 8 Reporter, 816 Hinckley was adjuded guilty of a contempt, and by a judge of the Circuit Court of Will County, Illinois, committed to jail "until the further order of the Court." On *Habeas Corpus*, he was discharged on the ground that the term of his imprisonment was indefinite, and depended alone *on the will of the judge.*

Holden *v.* Jones, 11 Mass. 396: Resolve by legislature authorizing a person to maintain a suit barred by statue of limitations, unconstitutional.

Hampshire *v.* Franklin, 16 Mass. 841 : Not in power of legislature to create a debt from one person or corporation to another, without consent of party charged.

Picquot, Appellant, 5 Pick. 65: Resolve directing a judge of probate to take an administration bond in a mode different from that prescribed by the general (standing) laws of the State, unconstitutional.

The attempt of James I. to make his proclamations the law of England was met by the decision of the judges, who said: "The King cannot create any offense by his prohibition or proclamation, which was not an offense before; for *ubi non est lex, ibi non est*

transgressio; ergo, that which cannot be punished without proclamation, cannot be punished with it."

2 St. Tr. 726.

This prohibitory ordinance, maintained in Massachusetts, makes in that State *a government of men, and not of laws*, reversing the declaration in the Bill of Rights of that Commonwealth, Art. XIX., that "this shall be a government of laws, and not of men."

VII.

This ordinance is not "the law of the land," or "standing law," but it assumes to override this law, and the paramount law of the State, and of the Nation.

"We accept Mr. Webster's definition of 'the law of the land.' This, said Webster, is the general law — the standing law — the law which hears before it condemns, which 'proceeds upon inquiry, and renders judgment only after trial.'

"The true interpretation of these constitutional phrases, 'the law of the land,' or 'due process of law,' is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away. But where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him in the due administration of the law itself, before the judicial tribunals of the State."

Comstock, J., in Wynehammer *v.* The People. 3 Ker. 392–393.

The rights of the plaintiff in error were acquired and secured, and their exercise regulated, by virtue of the Constitution of Massachusetts, Part First, Art. II. "It is the right, as well as the duty, of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or *restrained*, in his person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious professions or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship." And in Art. X. it is provided: "Each individual of the society has a right

to be protected by it in the enjoyment of his life, liberty and property, according to standing laws."

This right and duty of public worship and religious profession, exercised on public grounds fit and suitable, and used for or dedicated to such religious as well as secular uses, "there is no power in any branch of the Government to take away."

But the violation of the *proviso* — the regulation — that this right, *wherever exercised*, must not be so performed as to "disturb the public peace, or obstruct others in their religious worship," may be punished "in the due administration of the law."

By this ordinance and its enforcement, the State of Massachusetts has deprived the plaintiff in error of his liberty without due process of law, and denied him the equal protection of the laws.

VIII.

In the debate in the Senate of the United States on extending the Constitution to territories, February 24, 1849, Daniel Webster discussed this question of executive arbitrary power, and said: "It comes to this, then, that the Constitution is to be extended as far as practicable; but how far that is, is to be decided by the President of the United States, and therefore he is to have absolute and despotic power. He is the judge of what is suitable and what is not suitable, and what he thinks is suitable is suitable, and what he thinks unsuitable is unsuitable. He is '*omnis in hoc*,' and what is this but to say, in general terms, that the President of the United States shall govern this Territory as he sees fit till Congress makes further provision? Now, if the gentleman will be kind enough to tell me what principle of the Constitution he supposes suitable, what discrimination he can draw between suitable and unsuitable, which he proposes to follow, I shall be instructed. Let me say that, in this general sense, there is no such thing as extending the Constitution." Life of Daniel Webster, by Curtis, vol. 2, p. 365.

Mr. Webster's argument was, and is, unanswerable; and it is as applicable and conclusive respecting the question under discussion here, as in respect to the question to which it was addressed. As respects free public speech, the mayor of Boston is given "absolute and depotic power" by this by-law. "He is the judge of what is suitable and what is not suitable, and what he thinks is suitable is suitable, and what he thinks unsuitable is unsuitable. He is '*omnis in hoc.*'" WHOM HE WILL HE PERMITS, AND WHOM HE WILL HE REFUSES.

When those who contend for the validity of this Boston by-law will tell me—and this Court—what rightful discrimination the mayor can draw between persons suitable and unsuitable to be permitted by him to speak in public, in Boston, then, I, at least, "shall be instructed."

Webster said, "there is no such thing as extending the Constitution," by an Act of Congress, even; but there are those who seem to think our Constitution, State and National, may be extended—or *nullified*—by a city ordinance or by-law.

"No man is our master. We have no master but the law of the land." David Dudley Field in State of New York agt. Louisiana. —Speeches and Arguments, vol. 2, p. 455.

"'The law of the land,' is none other than the common law"; and "No laws shall be made or kept that are expressly against the law of God, written in his scripture; as to forbid what he commandeth."

Jacob's Law Dict. tit. Law, ed. 1736.

IX.

This ordinance may be and has been so enforced, operated, and used as to unjustly discriminate against the plaintiff in error and other citizens of Boston, having in common with all citizens the right peaceably and properly to use the Common and public grounds.

Under this ordinance, the mayor may delegate the power conferred on him, to others, and he may even "farm out" his permits, or the power to grant them. A combination, and a monopoly of preaching and speaking on Boston Common is somewhat more than possible.

In the report of proceedings in the Superior Court in Boston, published in the Boston Journal, Oct. 13, 1887, the following appears: "Mr. Dacey, [Assistant District Attorney] * * * I cannot see my way clear to do anything but move for sentence. It is such an easy matter to comply with the law [ordinance] in this case that I cannot see why Mr. Davis does not do it. The mayor has placed the entire matter in the hands of the Young Men's Christian Association and any minister or person recommended by it is instantly supplied with the necessary permit. 'That's just what we object to,' said Mr. Pickering. 'We don't admit that the Young Men's Christian Association or any other body or person has the right to have a monopoly of that kind.'"

This public and published statement of Mr. Dacey was never denied, nor corrected, and it is yet to be learned that a change for the better in this respect has ever been made.

The alleged "police power" of the State has been treated as though it was a thing which could be delegated to the City of Boston to "bargain away"; but Waite, Ch. J., in *Stone v. State of Mississippi*, 101 U. S. 814, said,—"All agree that the Legislature cannot bargain away the police power of a State, * * * and the discretion cannot be parted with any more than the power itself. * * * But the power of governing is a trust committed by the People to the government, no part of which can be granted away."

The unequal and partial use of this ordinance may be seen in the fact that none but preachers have been prosecuted for its violation, though other persons, well known to the police and the public, have spoken on the public grounds without a permit from the mayor. The occurrences at Faneuil Hall Square, and Adams Square, on the evenings of June 20 and 21, 1887, are historical and notable examples of such discrimination.

A valid law of the State, or ordinance of a city, may be wrongfully administered by officers of the State, or of a city, and so as to make such administration an illegal burden and exaction upon the individual.

Reagan *v.* Farmer's Loan and Trust Co., *supra*.

Such wrongful administration being open, public, common knowledge, and part of the history of the time, it is for the court to take judicial knowledge of it.

Eaton C. & B. Co. *v.* Avery, 83 N. Y. 31.
Merchants' Nat'l Bk. *v.* Hall, 83 N. Y. 338.
Clark *v.* Bradstreet, 6 N. E. R. 794.
McAlister *v.* Burgess, 24 L. R. A. 158.

Mr. Justice Miller, in the Slaughter House Cases, 83 U. S. 36; L. ed. 21, 395, took "judicial notice" of "events almost too recent," he said, "to be called history."

Chief Justice Waite, in Reynolds *v.* United States, 98 U. S. 244, said: "The word religion is not defined in the constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in which the provision was adopted."

See Powell *v.* Pennsylvania, 127 U. S. 678, 32 L. ed., 253. Also see dissenting opinion. Brown, J., in City of St. Louis *v.* W. U. Tel.

Co.; and opinion by Sawyer, J., *In Re* Tie Loy, The Reporter, vol. 21, p. 361.

In the last named case the ordinance declared that public laundries and wash houses in certain portions of the city were "injurious and dangerous to public health and safety, prejudicial to the well-being and comfort of the community," and made "it unlawful for ANY person or persons" to establish and carry on "any public laundry or public wash house, within any portion of the city of Stockton other than that portion of said city lying west of Tule Street and south of Mormon channel." But the Court said of this ordinance, "It absolutely destroys at its chosen location an established ordinary business, harmless in itself and indispensible to the comfort of civilized communities, and which cannot be so conveniently carried on elsewhere." The Court took judicial notice that *no occasion or need* warranted the making and enforcing of that ordinance *against* ANYBODY. "If," said the learned judge, "the city of Stockton can prohibit the washing of clothes for hire within its inhabited and habitable limits, it can prohibit the washing of clothes BY ANY CITIZEN, *for him or herself, anywhere within the city of Stockton.*

"Washing for hire cannot make the operation a nuisance, if it be not otherwise a nuisance. One may cook his dinner in such a manner and under such conditions as to render the operation a nuisance. Unfortunately this necessary, and ordinarily harmless act has sometimes been so performed as to be dangerous. Does it follow from this fact that all the inhabitants of the city of Stockton may, under the police power of the State, be lawfully prohibited from cooking their meals within the habitable limits of that city? It is not apparent why they may not be thus prohibited, if this ordinance be valid under the power invoked, or any other power. Indeed, if this ordinance be valid, it is difficult to perceive what rights the people of California have which a municipal corporation is bound to respect. Of course, no one can in fact doubt the purpose of this ordinance. It means: 'The Chinese must go.' And in order that they shall go, it is made to encroach on one of the most sacred rights of citizens of the State of California of the Caucasian race as well as upon the rights of the Mongolian.

"The police power is invoked to sustain this ordinance, but the police power only extends to the regulation of the necessary pursuits of man, so that they shall not become in their mode of exercise unhealthy, noisome, dangerous, or otherwise destructive or injurious to the common interests of the community.

"It does not extend to the destruction or driving to inconvenient and unprofitable localities of necessary or useful occupations, carried on in such a manner as to be harmless.

"It is not easy to define the police power by general terms, in advance. * * * Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise for any purpose whatever, encroach upon the powers of the general government or rights granted, or secured, by the supreme laws of the land, and under color of the police power, 'objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution.' (Stone *v.* Mississippi, 101 U. S. 818) * * * thus, this ordinance in question, it seems to me, violates that clause of the Fourteenth Amendment which says: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' * * * Under the same definitions the ordinance also violates the clause which secures the personal liberty of the citizen."

It is not less manifest that the ordinance in the case at bar is levelled solely at preachers of the gospel — at those who would *carry* the gospel freely to the people who do not, many of whom cannot, and others who will not, attend in the churches — than that by-laws, orders and ordinances have been levelled at Chinese laundrymen in California; and, if there has been *partiality in the enforcement* of such ordinances, orders, or by-laws, against Chinamen in that State, there has been equal or greater *discrimination and partiality* here, in the enforcement of this Boston ordinance.

Numerous, and noted, have been the violations of this ordinance, by men well known, men in public life, men who were *not* preaching the gospel; but never has one of these been known to be arrested, or complained of in Court for so doing.

Against reputable, self-sacrificing gospel preachers *only*, has this ordinance been enforced by arrest and prosecution in Court.

"Of course, no one can doubt the purpose of this ordinance." It means: *The free gospel preacher, in public places, must go.*

X.

This ordinance is not warranted by the "Police Powers," nor is it a valid or legitimate exercise of those alleged powers.

The Legislature of Massachusetts receives all of its power and authority by grant in the Constitution of the State, Part Second, Chap. I., Art. IV. "And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and

reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof."

"All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them." Art. V., Part First.

The "Police Powers," and "Final Discretion," have no proper place in the Legislature of Massachusetts.

The power and authority to make "all manner of wholesome and reasonable" laws is both a *grant* and a *prohibition*.

The people of Massachusetts have not committed to the Legislature their full and complete functions of legislation and administration. "Final discretion" remains in the people.

"If a legislature undertakes to exert the taxing power, that of eminent domain, *or any part* of that vast, unclassified residue of legislative authority which is called, not always intelligently, the *police power*, this action must not degenerate into an irrational excess, so as to become in reality, something different and forbidden, — *e. g.*, the depriving of people of their property without due process of law; and whether it does so or not must be determined by the judges.

"In simple truth, while this is a mere judicial function, it involves, owing to the subject matter with which it deals, taking a part, a secondary part in the political conduct of government. * * * The ultimate arbiter of what is rational and permissible is indeed always with the courts, so far as litigated cases bring the question before them. This leaves to our courts a great and stately jurisdiction. It will only imperil the whole of it if it is sought to give them more. They must not step into the shoes of the law-makers." Prof. James B. Thayer, 7 Har. Law Rev. p. 148.

XI.

By said ordinance and its inforcement, the plaintiff in error is arbitrarily and unjustly discriminated against and deprived of the rights, liberties, and immunities secured to him in the Bill of Rights in the Constitution of Massachusetts, and by Article 1 of the 14th

Amendment of the Constitution of the United States without due process of law, and contrary to the law of the land.

Cases cited under Point I and:—

State *v.* Dering, 84 Wis. 585, 30 L. R. A. 225.
State *v.* Conlon, Conn. 3 Atl. Rep. 519.
In re Lowe Kan. 39 Pac. Rep. 710.
Harding *v.* People, 160 Ill. 459, 32 L. R. A. 445.
Eden *v.* People, 161, Ill. 296, 32 L. R. A. 659.
Ex parte Jentzsch, Cal. 32 L. R. A. 664.
Louthan *v.* Com. 79 Va. 196, 52 Am. Rep. 626.
Blair *v.* City of Waco, U. S. C. C. of App. 75 Fed. Rep. 800.
State *v.* Ryan, 36 N. W. Rep. 823.
State *v.* Kuntz, 47 La. Ann. 106.
People *v.* Gillson, N. Y. 17 N. E. Rep. 343.
Chicago *v.* Stratton, 44 N. E. Rep. 853.
People *v.* McCoy, 20 Chicago Leg. News, 151.
Chicago, &c., Ry. Co. *v.* Minn. R. & W. Com. 134 U. S. 418, 33, L. ed. 970.
People, Molony *v.* Kirk, 162 Ill. 138.
Lafferty *v.* Chicago, &c. Ry. Co. 38 N. W. Rep. 660.
Braceville Coal Co *v.* People, Ill. 35 N. E. Rep. 62.
New Memphis Gas & L. Co. *v.* Memphis, 72 Fed. Rep. 952.
Rathbone *v.* Wirth, 45 N. E. Rep. 15.
Missouri Pac. R. Co. *v.* Nebraska, 6 U. S. Opinions. 81.
Cowan *v.* Fairbrother, 32 L. R. A. 829.
State *v.* Mayor, 23 L. R. A. 685.
State *v.* Jersey City, 27 N. J. L. 170, 175.
State *v.* Post, 26 Atl. Rep. 683.
Capital City Gas Co. *v.* Des Moines, 72 Fed. Rep. 818.
State ex rel. Jameson et. al. *v.* Denny et. al., 21 N. E. 252.
Lake View *v.* Rose Hill Cem. Co., 70 Ill. 191: 22 Am. Rep. 71.
Minnesota *v.* Barber, 136 U. S. 313, 34 L. ed. 455.
Daily *v.* Superior Court, &c., 32 L. R. A. 273.
Black Const. Law. pp. 472, 473.
Cooley Const. Lim. pp. 517, 518.
Ordronaux Const. Legislation, p. 236.
3 Story Const. p. 731.

In Beatty *v.* Gillbanks, 9 Q. B. D. 308 (Salvation Army Case) defendants knew they were hated by the roughs, and that an attempt would be made to disturb the arrangements, with the probable result

of a breach of the peace and the breaking of heads. In spite of this knowledge it was held that defendants could not be rightly convicted of an unlawful assembly.

See also, dissenting opinions in,—

People *v.* Warden of City Prison, 39 N. E. Rep. 689, and *Re* Flaherty, 27 L. R. A. 529, Cal.

This ordinance is made and maintained on the false assumption that the preaching of the gospel in public — on public grounds — is, of itself, calculated to disturb the public peace and cause injury to public property, and is a *nuisance;* and this, no city or town by its by-law or ordinance may do.

Yates *v.* Milwaukee, 77 U. S. 497, 19 L. ed. 984.
Wood's Law of Nuisances § 740.

"Whether any particular thing or act is, or is not permitted, by the law of the State, must always be a judicial question, and therefore, the question what is, and what is not, a public nuisance, must be judicial, and it is not competent to delegate it to local, legislative, or administrative boards."

Cooley Const. Lim., p. 742, note and cases.

When a man appears before the Mayor and begs for his "permit" to obey the command of Christ to his disciples, by what prescribed rule made by the city council, and found in this ordinance, must the Mayor grant or refuse his permit?

If the Mayor exercises a "ministerial" act, that is "one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done."

Perkins, J., in Flournoy *v.* City, &c., 17 Ind. 169.

If the Mayor exercises judicial power, that is the determination of the existing law in relation to something already done, or happened.

Bates *v.* Kimball, 2 D. Chip. 77.
Merrill *v.* Sherburne, 1 N. H. 204.

Hohe *v.* Henderson, 25 Am. Dec. 677.
Cooley Const. Lim. 92.

In the one case he is invested with both executive and judicial powers, and in the other his action is nugatory, but vexatious, burdensome, and intolerable.

XII.

The Legislature did not, and could not, delegate to the city of Boston authority to make this ordinance, which is *not* "wholesome and reasonable."

The authority to make this ordinance must be sought for in the power conferred in Sect. 35, of the Acts of 1821, called the city charter. By this Act, "the Mayor, Aldermen, and common council" * * * * have "power to make all such needful and salutary by-laws, or ordinances, not inconsistent with the laws of this commonwealth, as towns, by the laws of this commonwealth, have power to make and establish."

What, then, were the powers of towns here conferred upon the Mayor, Aldermen, and common council of Boston? Those which were expressed and defined in the Revised Statutes of 1785, C., 75, S. 7, whereby "towns are empowered to make and agree upon such necessary rules, orders, and by-laws for the directing, managing, and ordering the prudential affairs of such town, as they shall judge most conducive to the peace, welfare, and good order thereof, not repugnant to the general laws of the government."

In the Revised Statutes, 1836, C. 15, Sect. 13: "The inhabitants of each town may make all such necessary orders and by-laws for directing and managing the prudential affairs of the town, as they shall judge most conducive to the peace, welfare, and order thereof; * * * * provided the said orders and by-laws shall be approved by the court of common pleas for the county, and shall not be repugnant to the laws of the commonwealth."

"Sect. 15. All by-laws made by any town shall be published in one or more newspapers printed in the county where such town is situated."

In 1847, the Legislature passed the Act, C. 166: "The Mayor and Aldermen of any city, and the inhabitants of any town in this commonwealth, shall have power and authority to make all by-laws that may be necessary to preserve the peace, good order, and internal police, of their respective cities and towns; and they may annex

suitable penalties, not exceeding twenty dollars, for any one breach thereof."

Taking this Act as it reads, one might think that the legislature undertook to delegate to our cities and towns, the making of the laws whereby to preserve the public peace, in ignorance or disregard of our State constitution, and of the rights of the people; and this view seems to have prevailed in the town of Adams, which made a by-law as follows: "Whereas, it appears to the inhabitants of the town of Adams, in town meeting assembled, that it is necessary, in order to preserve the peace, good order, and internal police of the town, that the sale of all intoxicating liquors within the same should be prohibited by law; Therefore, it is resolved by said inhabitants, that if any person shall sell in the town of Adams any strong beer, ale, or other intoxicating liquor, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first duly licensed by law so to do the same, shall forfeit for each offense the sum of twenty dollars.

That each forfeiture incurred under the foregoing provision shall inure one-half thereof to the use of the person or persons who shall complain and prosecute for the same, and the other half to the use of the county of Berkshire."

The case of Commonwealth v. Turner, 1 Cush. 493, (1848) was brought for the violation of this by-law. Shaw, C. J., in giving the opinion of the court, says: "The Act of 1847 omits the qualifying words, 'for directing and managing the prudential affairs of the town.' The argument is, that by omitting this limitation, by which the power of towns to make by-laws is restricted in cases affecting their prudential affairs, it was intended by the legislature to confer on towns a power of legislation, limited only by their judgment of what the peace, good order, and internal police might render expedient. This power would extend, under such a construction, to every department of the criminal law affecting the public peace; to assaults and batteries, to riots, routs, and unlawful assemblies; to forcible entry and detainer; and to all offences involving a breach of the peace. It would include all acts which tend to disturb the peace, such as libel and slander; and would extend to the regulation of all places of public resort and amusement, at all times and under all circumstances.

If it were clear, from the language used, that the legislature intended thus to delegate their whole power of legislation on the subject of criminal law, to towns, it would be a grave question, whether such an act would be within their constitutional authority. But we are satisfied that such was not the intent of the legislature in the act

of 1847. If the legislature had designed so extensive an enlargement of the power of towns, it would have been in terms more explicit, that such purpose would have been expressed."

This was the end of an apparent attempt of the legislature to *delegate* to towns — and to the city of Boston — the power to make by-laws or ordinances *to preserve the public peace*.

Thus the law has ever since remained. In the General Statutes of 1860, Chap. 18, Sect. 11, it read: "They [towns] may make such necessary orders and by-laws, not repugnant to the laws of the State, for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof, as they may judge most conducive to the welfare of the town; and may affix penalties for breaches of such orders and by-laws not exceeding twenty dollars for one offence."

In Public Statutes Chap. 27, Sect. 15, towns are authorized to make "such necessary orders and by-laws, not repugnant to law, as they may judge most conducive to their welfare, and may affix penalties, not exceeding twenty dollars for one offense, for breaches thereof: — For directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof."

Now, nothing can be clearer than this: THE POWER OF THE CITY OF BOSTON TO MAKE BY-LAWS OR ORDINANCES, IS EXPRESSLY LIMITED AND RESTRICTED TO ITS "PRUDENTIAL AFFAIRS."

What, then, are these "prudential affairs?"

This question is answered in Willard *v.* Newburyport, 12 Pick. 230, by Shaw, C. J.:—"Perhaps no better approximation to an exact description can be made, than to say that it embraces that large class of miscellaneous subjects affecting the accommodation and convenience of the inhabitants, which have been placed under the municipal jurisdiction of towns, by statute or by usage. Many such subjects will probably occur to the recollection of those who are conversant with the proceedings of towns, as unquestionably within the jurisdiction of towns, in respect to which there are no statute provisions; such as public hay scales, burying-grounds, wells, and reservoirs, and many others."

By statute only, has this list been enlarged. The city has thus been authorized to make ordinances for the removal of snow and ice from the sidewalks, to prevent pasturing cattle upon the streets, to regulate driving cattle in the streets, to regulate the transportation of offal through the streets, to prohibit fast driving in the streets, to regulate the passage of vehicles, and the use of sleds for coasting; and, "The Mayor and Aldermen of a city may adopt rules and orders

not inconsistent with law for the regulation and control of persons who frequent the streets and public places therein playing on hand-organs or other musical instruments, beating drums, blowing trumpets, or coasting with sleds and other vehicles."

Public Statutes, Chap. 53, Sects. 7, 10, 11, 12, 13, 15, 16.

By the Public Acts, authority is given to the City of Boston to make certain other "rules and orders," and "ordinances," all of which are of a "prudential" nature.

Prudential affairs are also defined in:

Commonwealth *v.* Worcester, 3 Pick. 462.
Spaulding *v.* Lowell, 23 Pick. 71.
Commonwealth *v.* Turner, 1 Cush. 493.

These were the things concerning which the town authorities from the first took charge. This appears from the orders which were constantly made and enforced. For instance, in 1651, "June 20. — If Francis Smith don't remove his house out of the highway in three days, he shall be fined 20 *s.* and 10 *s.* a day after. If Wm. Franklin don't fill up the ground he hath digged in the town's highway at the north end of the bridge near the house of Humphrey Milam in ten days he shall pay 20 *s.*" "June 30.— James Jimson to see that noe stones or tymber shall lie upon the flats above 48 hours. Wm. Pollard to see that no stones or tymber lie in the streets at the south end of the town, and Rich'd Bennet the same at the north end; agreeable to an order of 31 Nov., 1649. Aug. 11.—The Select men are ordered to take care from tyme to tyme for the prevention of damage of fyer by defective chimneys. No. 6.—Martin Stebbins is fined 20 *s.* unless he secure his chimney from danger of fire in ten days."

In 1645, the General Court passed a bill which authorized Major Gibbons, of Boston, and Major Sedgwick to *keep the peace* in their respective towns, "and not to permit any ships to fight in the harbor without license from Authority."

But these majestic majors were not given power to make by-laws to preserve the peace, nor to give permits to fight. They were but a sort of special police officers, or rather *military* officers, having fighting men at their command.

From the first, the peace has been preserved here by the *State*, and not by the town, or City of Boston.

The first entry in the records of Boston, as stated in Drake's History, is this: "Whereas it hath been founde that muche damage hath

alreadye happnd by laynge of stones and loges neere the bridge and landinge place, whereby desent boats have been much brused; prvention of such harmes for tyme to come, it is ordered that whosoever shall unlade any stones, lumber or logges, where the same may not be plainly seene at highe water, shall sett up a pole or beacon to give notice thereof, upon paine that whosoever shall faile so to doe shall make full recompense for all such damage as shall happen; *being only declarative of ye common laws herein.*" Sept. 1, 1634, is the date of this Record. Drake's History of Boston, 173.

"The authority of the city council with regard to the common and public garden is *limited* by section 39 of the charter, by St. 1859, C. 210, and by Public Statutes, C. 54, §§ 13, 14, 16, 17." Note, to chapter 37, Revised Ordinances, ed. 1883.

Sect. 39. City Charter: "The city council shall have the care and superintendence of the public buildings, and the care, custody and management of all property of the city, with power to lease or sell the same, except the common and Faneuil Hall."

The St. C. 210 of 1859, does not relate to the common.

Sect. 13. Chap. 54 Public Statutee: Streets, etc., not to be laid out "over a common or park dedicatrd to the use of the public, or appropriated to such use without interruption for the period of twenty years; nor shall any part of snch coummon or park be taken for widening or altering a town way, or street, without the consent of the inhabitants of the city or town, after public notice," etc.

Sect. 14, relates to the manner of proceeding in the matter of "consent." Sect. 16: "No building exceeding six hundred square feet in area upon the ground shall be erected in or upon a common or park dedicated to the use of the public, without leave of the General Court."

Sect. 17, provides that any violation of the preceding section may be restrained by the Supreme Judicial Court, or a justice thereof.

The city council of Boston, therefore, has no authority whatever to make any *rules or regulations* "with regard to the common."

The General Court has recognized the fact that the common and its use were wholly in the hands of its owners, the inhabitants, and that the purpose to which it had been devoted and dedicated were well-known; and that these could not in any way be taken away or restricted.

But, *no rules or regulations have been made* by the city council, "with regard to the common."

If the legislature had authority to confer on the city council of Boston the power to grant permit to preach, or make a public ad-

dress, on Boston common, then this power was vested in the city council solely, and could not be by the council delegated to or conferred on the mayor alone.

East St. Louis *v.* Wehring, 50 Ill. 28.
Kinmundy *v.* Mahan, 72 Ill. 462.
State *v.* Bayonne, 44 N. J. L. 114.
St. Louis *v.* Russell, 20 L. R. A. 723 & note.
Lamenstein *v.* Fon du Lac, 28 Wis. 336.
Day *v.* Green, 4 Cush. 433.

From head notes to the last named case: "Where a by-law of a city prohibits the moving of buildings through the public streets, without a license granted by the mayor and aldermen, the board of Aldermen cannot delegate to the mayor alone the power to grant such license." And Shaw, C. J., said: "The court are of the opinion that the authority thus vested in the board, organized and acting together as an administrative body, *could not be delegated by them to a single member, although the constitutional head of such board, to be exercised according to* HIS VIEW OF EXPEDIENCY."

In Johnson *v.* Macon,—Ga.,—it was held that the mayor and council having the power delegated to them to tax cannot delegate it to the mayor alone: and so much of the ordinances as so delegates this power is void.

XIII.

The power of cities to adopt any "police regulations," for which an occasion appears, is inherent in them; hence, a city may make an ordinance for which an occasion is clearly shown, provided it be a reasonable *police regulation*, and confined to "prudential affairs"; and this without any legislative authority to make it.

State *v.* Wordin, Conn. 6 N. E. R. 752.
Walker *v.* Jameson, Ind. 39 Cent. L. J. 178.
Kaufman *v.* Stein, Ind. 39 Cent. L. J. 141.
Galena, &c., R. *v.* Dill 22 Ill. 264.
Galena *v.* Appleby, 28 Ill. 283.
Detroit *v.* Fort Wayne, &c., R. Co. 20 L. R. A. 80.

But no city or town has, or can have, authority to make a by-law, or ordinance, which is *not* a "police regulation," and concerning its

"prudential affairs." No city or town can make *general* or "standing laws"; nor make a by-law or ordinance repugnant to those laws,— much less, make a by-law or ordinance, to subvert the *constitutionally* secured rights of the people.

The rights of persons, in respect to the things provided by the legislature, the legislature may alter, or take away; that which the legislature gave, it may change, or take away: but the natural rights of man,— rights which he may not divest himself of,— reserved and declared in the Bill of Rights, and made "Part the First" in our State constitution, the legislature can neither abrogate, amend, nor regulate: and, no claim of an *inherent* "Police Power," unknown to, and outside of, our constitution, can authorize *the least infringement of those* SUPREME *and* SACRED RIGHTS.

The city council of Boston, whose sole *right* in respect to the police, is limited by law to the *duty* to provide the money to pay them; this body that the legislature cannot trust to so much as to authorize the appointment by the mayor of a single policeman, nor to make our Police Rules and Regulations; that cannot make an ordinance for the removal of snow and ice from our sidewalks, by virtue of the authority given in the city charter — the authority, which is the sole warrant claimed for the making of the ordinance here in question — without special authority to do so, conferred by an Act of the legislature; that cannot make an ordinance to prohibit the pasturing of cattle upon the streets; to regulate the driving of cattle in the streets; to prohibit fast driving in the streets; to regulate the passage of carriages; to regulate coasting; to regulate organ-grinders, —that cannot do one of these things without special authority by Act of legislature, this impotent body, impudently undertakes to make an ordinance which shall place our *constitutional rights* in the autocratic keeping of the mayor.

The cases relied on by the counsel for the commonwealth, have no weight whatever, and are of no authority against the fundamental principles maintained, and the authorities cited in this brief.

No case can be found, outside of those under the Slave Codes of the South, and the long since discredited treason, libel, and sedition cases in England, which can be used to support the assumption that the constitutionally secured rights of free public worship, and free public speech,— *exercised in compliance with the conditions written in the constitution*,— may be taken away or infringed upon, prohibited, or regulated, by the by-law of a town, the ordinance of a city, or even by an Act of the legislature.

These are matters far above the province of "police regulation," *by-laws*, and *ordinances*, which are mere *local rules* in respect to "prudential affairs."

XIV.

The constitution of Massachusetts secures and *regulates* the right of religious liberty, and *there can be no other regulation of this right* save that in the Constitution of the United States.

A right to be exercised in compliance with the conditions specified in the constitution, cannot be made subject to any other conditions or regulations.

A right, asserted and reserved, secured and regulated, in the constitution, cannot be controlled or prohibited, or its exercise punished, through a city ordinance, nor even by an act of the legislature.

The provisions of the State Constitution, and of the United States Constitution, in respect to religious liberty, and freedom of speech, are self-executory, and do not need, nor admit of, any legislative or municipal regulation.

Prigg *v.* Pennsylvania, 16 Pet. 539.
Slaughter *v.* People, 2 Dory. (Mich.) 334, note.
Philadelphia *v.* Field, 58 Pa. St., 320.
Tilford *v.* Ramsey, 43 Mo. 410.
East St. Louis *v.* People, 14 West. Rep. 12.

In Northamption *v.* County Com'rs, 145 Mass., 109, Devens J., said: "It is obvious that the principal, perhaps the only object of *the constitutional provision* that taxes shall 'be proportional and reasonable,' is the *protection* of the tax payer against any *arbitrary, unjust or oppressive* exercise of the power of taxation."

The rights of personal and religious liberty, the rights of conscience, and the right to know, to heed, and to obey God, are not less entitled to the protection of the laws, than are the rights of property. *Conscience* created the State, and the Republic.

XV.

THE TITLE, OWNERSHIP AND USE OF BOSTON COMMON.

The title to Boston Common is vested in the inhabitants of Boston, who are the owners thereof.

The corporation or city, is but the *trustee* to hold the Common for the uses to which the people had devoted and dedicated it.

The city, or municipal corporation, has no power, authority or right to divert the Common to any use or purpose other than uses and purposes to which it was devoted or dedicated by the inhabitants at and before the time of the Act constituting the city charter; and the city council cannot take away, or impair the right of the people to use the Common as from time immemorial they had been accustomed to use it.

By the king's patent, the land now Boston Common, was granted to the Massachusetts Company. See Drake's History of Boston, pp. 62–67.

Mr. William Blackstone, however, had possession and a good title to the land. In Mather's Magnalia, B. 3, p. 7, quoted by Drake, it is said that Blackstone "laid claim to *all* the ground * * * until *the inhabitants* gave him satisfaction." Drake's History, p. 69.

Mar. 30, 1640. "Ordered that no more land be granted in the town, out of the open ground, or common field, which is left from Sentry Hill and Mr. Colburn's end, except 3 or 4 lots to make up the street from Bro. Robt. Walker's, to the Round Marsh." *Ib.* p. 253.

1646, May 18. "All persons admitted to inhabit, to have equal right of Commonage." "No person allowed to sell his right of Commonage." *Ib.* p. 303.

In 1684, the inhabitants of Boston, further to secure their title to this land obtained a deed from Indians. *Ib.* pp. 456, 457.

In 1704, the inhabitants of Boston, to perpetuate evidence of their title and ownership of this land caused certain depositions to be taken, the substance of which is to be found in pp. 530, 531 of Drake's History of Boston. The four men who gave these depositions testify to their having "dwelt in Boston from the first planting thereof, and continuing so at this day (June 10th, 1684); that in or about 1634, the said inhabitants of Boston (of whom the Hon. John Winthrop, Esq., Governor of the Colony, was chief), did agree with Mr. William Blackstone for the purchase of his estate and right in any lands lying within the said Neck, called Boston; and for said purchase agreed that every householder should pay 6 *s.*, none paying less, some considerably more, which was calculated and paid to Wm. Blackstone to his full satisfaction for his whole right, reserving only about six acres on the point commonly called Blackstone's point, on part whereof his then dwelling house stood. After which purchase the town laid out a place for a training field [the common], which has since and now is used for that purpose, and for the feeding of cattle."

On p. 806, Drake says of the common: "It is a reservation out of the original grant to the Massachusetts Company; and was held by the Government of said Company for the common benefit of the com-

pany and their successors. * * * It was common cow pasture within the present century."

The preachers, Wilson and Phillips, delivered many sermons on this common. For two years there was no meeting house in Boston. See p. 141, Drake's History.

About 1740, Whitefield preached on Boston Common to 20,000 people; Sunday, Sept. 21, he preached there to about 10,000 persons. Oct. 12, it is said 20,000 or more gathered on Boston Common to hear Whitefield.

But certain well settled ministers of Boston and Cambridge did not approve this preaching to the masses, and Dr. Douglas deplored the loss to "poor deluded tradesmen and laborers," and he estimated that every exhortation was about £1,000 damage to Boston! And yet, "the Great Revival," which began in 1745, "was occasioned," says Drake, by Whitefield's preaching. In 1741, James Davenport, of Long Island, preached on the common to large audiences; July 27, 1742, to an "immense assemblage." He "introduced the singing of hymns in the streets," says Drake.

It was on Boston Common that Jesse Lee planted Methodism in Boston.

From the days of minister Wilson down to 1862, when this ordinance was originally made, the common was customarily used for the public preaching of the gospel, and for public speaking. This customary right of the inhabitants of Boston, they cannot be divested of by the corporation called the City of Boston, nor by the legislature.

In 1850, the city council of Boston could close the doors of Faneuil Hall against Daniel Webster, but then there was no ordinance which required him to have a permit to speak in Bowdoin Square; and in 1852, he made his last speech, not in Faneuil Hall, but on Boston common,— without a "permit."

The city of Cincinnati *v.* The Lessee of White, 6 Pet. 413; 8 L. ed. 453, was an action to recover land included in the "common" of said city, and argued by Daniel Webster for, and Henry Clay against the city.

In the Circuit Court it was ruled,—"that although there might be a parol reservation and dedication to the public use of lands, yet such reservation and dedication did not invest the public with the fee; and that a possession and enjoyment of the use for less than twenty years was not a defence to this action" (brought against the city).

This doctrine was refuted and overruled by the Supreme Court, and the principles on which the dedication of land to public use —

streets, or common — rest, were stated. A piece of ground left open for common and public use, for the convenience and accommodation of the inhabitants, is lawfully dedicated to the public use; and where, "after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppal *in pais*, which precludes the original owner from revoking such dedication." "The right of the public to the use of common in Cincinnati must rest upon the same principles as the right to the use of the streets." "The is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation." "And from the notoriety of the fact that these grounds were laid open and used as a common, it is fairly to be presumed that all subsequent purchasers had knowledge of the fact."

In Barclay *et. al. v.* Howell's Lessee, 6 Pet. 498; 8 L. ed. 487, the Supreme Court said: "If this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a court of chancery to compel a specific performance of the *trust*, by restraining the corporation, or by causing the removal of obstructions." "The town [Pittsburg] was laid out in the spring or summer of 1784; no act was done by the proprietors showing any claim to the land in controversy until September, 1814, when the deed to Wilson was executed. Here is a lapse of about thirty years, within which no right is asserted by the Penn family hostile to that which was exercised by the City in the use of this ground, to the extent which its means enabled it to improve, and the public convenience seemed to require." "In some cases a dedication of property to public use" * * * "six or seven years'" use has been "deemed sufficient evidence of dedication."

The Mayor, &c., of New Orleans *v.* the United States, 10 Pet. 662; 9 L. ed. 573, affirms the principles upon which the above named cases were decided, and holds that in order to dedicate property to public use it is not essential that the right to use the same shall be vested in a corporate body, but that it may exist in the public, and have no other limitation than the wants of the community at large.

But, "The establishment of public highways being a function of government, no person has a right ro establish such a highway with out the consent of the government." *Mr. Justice* Harlan, In Louisville Gas Light Co. *v.* Citizens Gas Light Co., 115 U. S. 683; 29 L. ed. 514.

"Ferries are part of highways." *Ib.*

In the Hartford Bridge Co. *v.* East Hartford, 16 Day., 149, it was held that the ferry between these towns was a franchise, and corporate property, and distinguished from the property belonging to the individuals or inhabitants residing within the limits of the corporation, and upon a division of the town, no part of the franchise passed to the new town.

The municipal lands held by the city of San Francisco, as successors of the *pueblo*, are not held as absolute property, but *in trust* for its inhabitants.

Townsend *v.* Greeley, 5 Wall. 326; 18 L. ed., 547.

A municipal corporation takes the title to its streets *in trust*.

St. Paul, &c., *v.* Schurmeier, 7 Wall. 272; 18 L. ed. 657.

The word "dedication" can be understood to mean no more than permitted to be used by the public.

Hoar, J., in Morse *v.* Stocker, 1 Allen, 150.

Where the proprietors of a town set apart a piece of undivided land as a public square or common, which is afterwards used by the public, without interruption for a number of years, the town has no power to convey a right to an exclusive possession of any part of it, nor to give to any person or persons the exclusive use of any part of it, to the exclusion of any other person or persons in said town or city.

Abbott *v.* Mills, 3 Vt. 521.
Pomeroy *v.* Mills, 3 Vt. 279.
State *v.* Trask, 6 Vt. 355.
Stiles *v.* Curtis, 4 Day. 328.
Commonwealth *v.* Alburges, 1 Wheat. 469.
Emerson *v.* Wiley, 10 Pick. 310.
First Parish in Shrewsbury *v.* Smith, 14 Pick. 297.
See also Lincoln *v.* Boston, 148 Mass. 578.

"The legislature has no power, either directly or indirectly, to divest a municipal corporation of its private property, without the consent of its *inhabitants* lawfully obtained."

Milwaukee *v.* Milwaukee, 12 Wis. 93.

In Clinton *v.* Cedar Rapids, &c., R. Co., 24 Iowa, 455, it was held: "Where the fee of the street is in the public, or in a city corporation *in trust* for the *public*, the legislature may authorize the *use* of the street by a railroad company without the consent of the city, and without compensation." The "public," in this case, are not the *inhabitants* of the city, but all the people of the State; and —, "The establishment of public highways" is "a function of government."

But: — "Neither individuals, nor aggregate bodies, nor the government itself, can prescribe against rights of the citizen, with respect to any privilege secured by the constitution."

Baker *v.* Fales, 16 Mass. 488, 520.

"A right to common being an incorporeal hereditament, and collateral to the land, *cannot be divested*. For though a person entitled to a right of common be not in the actual enjoyment of it, yet by *non user* only for a time, he does not cease to have a vested estate or interest therein."

3 Greenl's Cruise on R. P., * p. 72.

"A custom for all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in the close of A, at all seasonable times of the year at their free will and pleasure, is good." Marginal note in Fitch *v.* Rawling, *et als*, 2 H. Bl., 393 (1795). "A custom for the inhabitants of the *vil* to *dance* in the plaintiffs close for their recreation, was holden to be a good one." Abbott *v.* Weekly 1 Levins Rep. 176 (cited in Fitch *v.* Rawling).

1. The free public preaching of the gospel on Boston common was customary, and a usage, from time immemorial up to the time of the making of the ordinance in 1862, of which the present ordinance is a continuance, though amended and revised.

Never was the public peace disturbed or threatened, nor the equal and just rights of others in any way infringed, disturbed or threatened by such preaching; nor was it ever alleged or suggested that the common was in any way damaged or endangered thereby.

No occasion has ever arisen showing the need of this ordinance.

Enacted without need or occasion, it is now unnecessary and unreasonable.

2. The assertion that this ordinance is needful and calculated to preserve the public peace, finds no support, but contradiction, in the historical facts touching this matter; and this assertion is without warrant in law.

The "public peace," is the peace of the Commonwealth, and is not preserved or secured by by-laws and ordinances made by towns and cities, but by the general laws — the "standing laws" — of the Commonwealth, made in accordance with the provision in the State Constitution which declares: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws"; and,—"In fine, the people of this Commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent."

It was not the purpose of the men who made this fundamental law to have our "constitutional representatives" cease to protect the people by general or "standing laws" in the full enjoyment of all the natural and sacred rights acknowledged and secured to them in our Bill of Rights, much less, to permit such representatives to place all — or any — of these inalienable rights in the keeping of selectmen, and of city councilmen, and in such manner, that while a man may enjoy and exercise the right of free, public religious worship in one town or city, as provided in the Bill of Rights, he may in another town or city be deprived of this constitutionally secured and regulated right, *by a by-law*.

3. If the city council of Boston made and intended this ordinance to preserve the public peace, then they undertook to make a law of the Commonwealth, and to exercise a power never delegated to them, and a power which the Legislature cannot delegate.

Never has it been possible for a person to break the public peace, or threaten to do so, whereupon the general or "standing laws" of the State were not all sufficient to prevent or punish such offender; and no change has been made in this matter by the making and enforcing of this ordinance.

Now, as before the making of this ordinance,—and before, as now —the public peace is preserved solely through the "standing laws."

Had this defendant committed a breach of the peace, or disturbed others, or trespassed on the grounds of the city, causing damage, he would, he should, he could — have been complained of under the ample laws of the State, but *for such offences he could not have been held under this ordinance*.

In fact, and in law, this ordinance has *nothing to do* with the public peace,— unless it be to beget dispositions to create disturbance.

No question touching the public peace can be put in issue in a prosecution under this ordinance; and the same is true as to disturbance, interference with others, and damage to the public grounds. How, then, can it be said that this ordinance was made and intended,

or is calculated to preserve the public peace? Or, to prevent disturbance, or interference with others, or to protect the public grounds?

A "permit," given by the mayor cannot authorize the preacher or other person having it, to break the peace, or disturb others, nor to damage the grounds; neither can the permit prevent or punish the doing of any of these things.

4. The preaching of a sermon, or making a public address on Boston common, cannot be prohibited as a public nuisance, nor as an unlawful assembly.

The preaching of a sermon, or making a public address, is not *per se* a nuisance; nor can the doing of these things be made or treated as a nuisance by a city ordinance.

That any act or thing authorized by an act of the legislature cannot be declared a public nuisance, has been often decided, and is elementary law.

The term "public nuisance" applies only to something occasioned by acts done in violation of law. A work authorized by law cannot be a nuisance. If a railroad prove an obstruction to the street, and a public injury, the making and maintaining of it is not punishable as a nuisance, if done as prescribed by the charter.

People *v.* Law, 34 Barb. 494.
Hinchman *v.* Patterson, 2 Green 75.
Commonwealth *v.* Boston, 97 Mass. 555.

A fortiori, the rights of religious liberty and free public speech exercised in compliance with the conditions expressed in the Bill of Rights, cannot be declared or treated as a nuisance.

"The fears of mankind will not alone create a nuisance, without the existence of real danger." Kent, C. J. in People *v.* Sands, 1 Johns. Rep. 1.

"Courts of law can only reach existing nuisances, leaving future acts to be the subjects of new persecutions or proceedings." Mr. *Justice* Harlan in Mugler *v.* Kansas.

The fear that a sermon or public address on Boston common, may cause a breach of the peace, create a nuisance, or convoke an unlawful assembly, will not warrant prohibiting, or permantly "proclaiming," all free public preaching or speaking on the common and other public grounds of Boston when there exists no real danger.

Making a speech in a public street is not a nuisance *per se*, but may become so by obstructing the public way.

Fairbanks *v.* Kerr, 70 Pa. St. 86, and 10 Am. Rep. 664.

In village of Des Plaines *v.* Poyer, 123 Ill. 348, it was held that picnics and dances are not nuisances *per se* and a village ordinance prohibiting them declared unreasonable and void.

In State *v.* Baldwin, 1 Dev. & Bat. 195 (N. C.) it was held that to curse and swear so loud at a tavern as to break up a singing-school near by, was not a nuisance.

A playhouse is not a nuisance in itself, but only as the play draws people, coaches and sharpers together.

Viner's Ab. Rex. *v.* Betterton, 5 Mod. 142.

"That a common playhouse may be a nuisance if it draws together such numbers of coaches or people, as to prove inconvenient to the places adjacent; and that it seems that they having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but only become so by accident." Hawk. P. C. 198.

Are sermons less tolerable than plays, in Boston?

What was the "Wild West Show," in Boston, on Sunday?

What was the dancing on Boston common, on Sunday?

What have been some of the meetings "permitted" there?

What were the meetings in Faneuil Hall Square, and in Adams Square which came perilously near to causing riots in Boston, June 20, 21, 1887? No "permit" of the mayor can justify a nuisance.

Nichols *v.* Pixley, 1 Root, 129.

The city of Boston has the power — and the duty — to abate every nuisance dangerous to *public health*,— which is a "prudential affair."

Baker *v.* Boston, 12 Pick. 184.
Hellen *v.* Noe 3 Iredell 493.

But the Statutes of this State,— the general or standing laws,— provide for the suppression of public and common nuisances, riots, unlawful assembles, and all breaches of the public peace; and for the punishment of all who offend in respect to these things.

A city is not liable for injuries caused by the failure of *its* police officers to disperse a mob.

Campbell *v.* Montgomery, 53 Ala. 527.
Elliott *v.* Philadelphia, 75 Pa. 347.

See also Buttrick *v.* City of Lowell, 1 Allen, 172.

But the city of Boston has no police officers,— *it cannot appoint one;* and yet, it assumes to make a *law* to preserve the peace!

Dancing on the common, and on Sunday, is lawful; there is no ordinance against that; and the city furnishes the music!

It has been publicly asserted, and never denied, that sixty or more couples danced on Boston common, to the city's music, on the Sunday that General Grant lay dead and unburied.

In *ex parte* O'Leary, Miss. it was held: "An ordinance, that all hog-pens, on lots now used as such, are a nuisance, is too broad, and is invalid."

Does not this Boston ordinance say, in effect, that all public preachers are a nuisance, and need to be under *dispensational power* placed in the hands of the mayor?

In a suit, against Kansas city by the proprietor of a circus, who had a license from the city and permission of persons purporting to own the ground on which the circus was going to exhibit, for interfering with and preventing the proposed exhibition, it was held that the city was not liable for the acts of the mayor and police of the city, as they acted not as officers of the city in its corporate capacity, but as servants of the public in preventing the prepetration of a nuisance.

City of Kansas City *v.* Lewen, 57 Fed. Rep. 905.

In Russell *v.* City of Tacoma, 35 Pac. Rep. 605 it was held that the city was not liable for the negligence of the officers engaged in improving a public park, this being for the public benefit and not for the corporate benefit.

See also Lincoln *v.* City of Boston, *supra.*

In Brigham *v.* Edmands, 7 Gray, 359, Bigelow, J., said: "We believe the uniform usage has been to perform these duties [Militia trainings] when required by law, either on the streets and highways, and upon the public commons and training fields, or upon the land of individuals under express license from the owners."

5. This ordinance violates Article XX. of the Bill of Rights in the State Constitution: "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide." No act of the legislature *expressly provides* for suspending the right of

free public religious worship, or the free public preaching of the gospel in the City of Boston. But, more than this: it is not in the power of the legislature itself to suspend the operation of the State Constitution, nor any of the rights therein secured to the people.

In all parts of the State where the Constitution and general laws prevail, the defendant may freely and fully exercise the rights reserved and secured in the Bill of Rights; but the instant he enters the City of Boston, *he is deprived of those rights through a by-law of the City Council!*

6. This ordinance *absolutely and arbitrarily prohibits* the making of public addresses, and especially the free public preaching of the gospel to the masses in compliance with the condition, or regulation, specified in Article II. of the Bill of Rights to wit: "provided he doth not disturb the public peace, or obstruct others in their religious worship."

7. Then it invests the Mayor of the City of Boston with the power, arbitrarily, at his unregulated will, to *dispense* with this prohibition in favor of such persons as he may be pleased to bestow his dispensation or indulgence on!

Under this ordinance the mayor gives to such persons as he may *arbitrarily* choose, exclusive possession of a certain part, or parts, of Boston common, for such limited time, and for such special purpose or use, as he *arbitrarily determines*, and, without any reason therefor, excludes all others. The ordinance warrants this action.

8. This ordinance requires that the mayor shall assume both judicial and executive powers,— which is expressly prohibited in the State Constitution, or, that avoiding this impeachable offence, he shall exercise no discretion or judgment whatever in issuing his permits.

Furthermore, the mayor is a part of the city council, and now holds in his hands the law-making power, the judging and determining or judicial power, and the administrative or executive power, in face of these plain words: "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial power, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men." Const. of Mass. Part the First, Article XXX.

It can hardly be contended that the legislature did, or could delegate to the city council of Boston the power to nullify this provision of our constitution.

9 It cannot be contended that this is an ordinance to regulate

the exercise of the right of free public speaking and preaching in Boston or on the Common or other public grounds, nor to regulate the use of those grounds.

To regulate, would be to prescribe and make known proper, reasonable and just rules and requirements, which, complied with, would apply equally to all persons entitled to use the grounds, and to exercise the right; but no rule whereby to regulate either the *use*, or the *right*, can be found in this ordinance.

Questions of qualification, fitness, propriety, or expediency, have no place in this matter.

The despotic word does the business.

10. Through this ordinance, the defendant is, "without due process of law" deprived of rights which the State could neither give, nor take away from him,—rights acknowledged, reserved, and secured by the Bill of Rights in the State constitution; thus violating both the constitution of the State, and the Constitution of the United States.

"It is a rule founded upon the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defence of his rights; and the constitutional provision that no person shall be deprived of these 'without due process of law,' has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State constitutions. It is a limitation upon an arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the legislature cannot do, nor authorize to be done.

'Due process of law,' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature. (Weiner *v.* Bunbury, 30 Mich. 201.) This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights." (From opinion, by Earl, J.., in Stuart *v.* Palmer, 74 N. Y. 183—190, and by Mr. Justice Mathews in dissenting opinion in Spencer *v.* Merchant, 125 U. S. 345—361, [31-76].

11. The preaching of the gospel, on Boston Common, on Sunday, to persons who voluntarily assemble there to hear it, peaceably, without disturbance, or interference with others, causing no damage to the grounds, constitutes a lawful and not an unlawful assembly, is not a nuisance, nor in any way injurious, dangerous or noxious; and such preaching, under such circumstances, is not of evil tendency and

bad in itself, but it is a thing *good in itself*, never more needed than now, and no city can make such preaching a crime, misdemeanor, or punishable offence by its by-law, or ordinance.

Save where the legislature may rightfully declare certain acts "to be unlawful, because they would be injurious, dangerous, or noxious," "crimes or offences punishable by law, consist in acts done, and not in mere unexecuted purposes and intentions."

Shaw, C. J., in Fisher *v.* McGir, *et als*, and Herrick *v.* Smith, 1 Gray 1.

"It is a maxim of policy in favor of natural liberty, that in every case of the deprivation or restraint of personal rights, the burthen is upon the Governors to show the necessity of such diminution and restriction.

"It is, therefore, a maxim of the English constitution, that no liberty of the subject, either in itself, or in any instrument by which it may be exercised, shall be repealed, restricted or abridged, unless the magistrate shall show, upon his part, *a full and sufficient civil reason* for such diminution. This is, in fact, the main distinction between tyranny and liberty." (Holt's Law of Libel, 1st Am. ed., p. 61.)

For this ordinance, no necessity, or "civil reason," has been or can be shown.

"If I was to describe slavery," said Edmund Burke, "I would say, with those who *hate* it, it is living under will, and not under law. * I would have no man derive his means of continuing any function, or his being restrained from it, but from the laws only; they should be his only superior and sovereign lords." (Speech on Relief of Protestant Dissenters. Works, ed., Little, Brown & Co., vol. 7, pp. 24, 27.)

"Men may lose little in property by the act which takes away all their freedom. When a man is robbed of a trifle on the highway, it it is not the twopence lost that constitutes the capital outrage, this is not confined to privileges. *Even ancient indulgences withdrawn, without offence on the part of those who enjoyed such favors operate as grievances.*" *Ib.* p. 157.

"There can be no freedom, where there is no safety to property or personal rights. Whenever legislation renders the possession or enjoyment of property precarious; whenever it cuts down the obligation and security of contracts; whenever it breaks in upon personal liberty, or compels a surrender of personal privileges, upon any pretext, plausible or otherwise, it matters little, whether it be the act of the many or the few, of the solitary despot, or the assembled multitude; it is still in its essence tryanny. It matters still less what are the

causes of the change; whether urged on by a spirit of innovation, or popular delusion, or State necessity (as it is falsely called), it is still power, irresponsible power, against right; and the more to be dreaded when it has the sanction of numbers, because it is then less capable of being resisted or evaded. * * * What remains to nourish a spirit of independence, or a love of country, if the very soil, on which we tread, is ours only at the beck of the village tryant?" Joseph Story, in his Inaugural Discourse, as Dane Professor of Law at Harvard University, Misc. writings, pp. 447, 453.

"Liberty, if I understand it at all, is a *general* principle, and the clear right of all the subjects within the realm, or of none. Partial freedom seems to me a most invidious kind of slavery. * * * But the true danger is when liberty is nibbled away, for expedients, and by parts. * * * Indeed nothing is security to any invidual but the common interest of all." Edmund Burke, Works, Vol. 2, pp. 198, 199.

"I AM SORRY FOR A MAN THAT HE SHOULD EVER BRING HIS CONSCIENCE DOWN TO SUBMIT TO THE DICTATE OF THE STATE ABOUT A THING WHICH CONCERNS CHRIST." Rev. C. H. Spurgeon, in "Why I Should Disestablish," p. 6.

"Given a corrupt church, which adopts the most questionable modes of self-support, and it may be possible to construct an argument whether the State should exercise A KIND OF POLICE SUPERVISION OVER ITS AFFAIRS; but given a church, founded in the faith and love of Christ, inspired by the Holy Ghost, and intent upon all manner of good works, and ANY official interference of the State would seem to be AN IRONY AND AN IMPERTINENCE." Rev. Joseph Parker, D. D., *Ib.* p. 12.

"As religion is the most potent factor in human affairs, rulers have always sought to control it. * * * Democracies have been as tyrannical as Autocracies." Rev. Newman Hall, *Ib.* p. 18.

"Christianity is the embodiment of liberty. It cannot brook the restraints of civil authority. * * * The church's sphere of action is the conscience, and that is a domain which the State can neither enter into nor control." Rev. James Macpherson, *Ib.* pp. 64, 65.

"*Truth is evolved by free competition and repressed by monopoly;* and the survival of the fittest in doctrine and church government is impeded by the interference of the State. * * * Neither is it a true representation of the Christian ideal that a church should be always on the side of the rich and powerful, and should never be the champion of the liberties of the people." Prof. John Massie, *Ib.* pp. 76, 77.

XVI.

This ordinance and its enforcement have served to prompt persons to break the peace and disturb religious meetings and worship on Boston Common.

Never, until since the first enforcement of this ordinance, had a religious meeting and preaching on Boston Common been disturbed and the peace broken.

But when it is determined that the preaching of the gospel on the common and on public grounds is "calculated" to cause disturbance and breaches of the peace, and injury to the grounds, what rights have gospel preachers which hoodlums and roughs ought to respect?

At one of those "proclaimed" or unpermitted meetings to worship God on Boston Common according to ancient and long continued usage, a person was arrested by the policeman there present, complained of, tried and convicted of disturbing a lawful religious meeting, and fined therefor the sum of *three dollars*.

But for preaching at that meeting *without a permit*, a minister of the gospel was, by the same judge, fined THIRTY DOLLARS!

See "Christian Liberties in Boston," p. 61, by Wm. F. Davis, 1887.

Between the years 1850 and 1856, one John C. Clure, addressed small gatherings on Sunday afternoons, on Boston Common, denouncing the conduct of the police of Boston, and for this he was compelled to cease holding such meetings there, when he went to the Custom House, and there spoke from its steps. There was at that time no ordinance or by-law of the City of Boston, prohibiting or regulating speaking on the Common or public grounds, and the law of the State was used to preserve the peace and protect the public grounds from injury.

The time and manner of making this ordinance are worthy attention; the first enactment was January 4, 1862, during the early part of our late war, and when speeches to induce enlistments were made on the Common, but, in those exciting times, no disturbance or fear, or thought of disturbance, was ever entertained by the public. Surely, preachers, at that time, were not considered as calculated to disturb the peace or injure the grounds, by addresses or sermons on the Common or any other public grounds. It now seems, however, that there was then a fear that others, besides those speaking for

recruits, might speak on the Common or other public grounds; for, there were men in Boston who ardently loved the Union, but because it stood for liberty, and the rights of man. Some of these men did not approve, or deem needful, certain arbitrary acts of the national administration; and these were the men really aimed at by those who made this ordinance.

Under the guise of preventing breaches of the peace and injury to the public grounds, the City of Boston now sets up a censorship of preaching and speaking in ancient, customary, and suitable places,—on the Common and public grounds. It undertakes, by this false pretense of preventing a most improbable and *never threatened* mischief, to control, prohibit, and suppress free public speech there.

Under the same guise and pretense, an ordinance may be made to place preaching and speaking in all private places — in halls, houses, and churches, under the arbitrary personal control of the Mayor. Are our people, or our "Rulers," ready or making ready for this?

When free public speech shall have been suppressed, how long will the "press" remain free?

There are editors and publishers who should remember — or learn — that it was *free speech* that gave a *free press*, and, if censorship is needed, *it is not for speech alone.*

Shall we, with this ordinance held valid, demand rights and privileges for our Christian Missionaries in foreign lands, which are denied to our Home Missionaries?

Mr. Stone, an American Missionary, in India, in 1835, wrote: "In the afternoon went to preach the gospel to the people *in the bazars of Sattara city*. I took my stand before the money-changer's shops, where the principal streets meet, and began to converse with the money changers. They spread a carpet and invited me to sit down. I thanked them for their politeness, but told them I preferred standing, as I could be better heard by the multitude who crowded around."

31 Missionary Herald, p. 215.

Imagine the sort of reception that would be given to the plaintiff in error, or to any other of our Home Missionaries, should he, or one of them, go to preach the gospel before the money changers on State Steet, or in Wall Street!

XVII.

This ordinance invests the Mayor of Boston with the Pontifical and Princely Power to *Dispense with* the prohibition contained in said ordinance, and also with the general or "standing" laws, and with our State and Federal Constitutions.

"Sir Edward Coke, in his first Inst., fol. 99, defines a Dispensation thus: '*Dispensatio est mali prohibiti provida relaxatio utilitate seu necessitate pensata.*'

"So that great utility, or necessity, are at least pretended for the granting of them; now public utility and necessity are the true grounds and foundation of all laws (which I have already shewn, bind all men alike, without respect of person) but a Dispensation does untie that knot, or slakens and lets loose that obligation, as to some particular persons, and in some cases, and for some limited time, at the Will and Pleasure of the Prince that exercises that power. See Dr. Field, Dean of Gloucester, in his Treatise of the Church, printed at Oxford, 1428, fol. 675, what a dispensation is, viz.: It is in respect of certain persons, times, places, and conditions of men and things. So that a Dispensation permitting the law to retain her wonted authority, only freeth some particular person or persons, at some times in some places, and in some condition of things from the necessity of doing or leaving undone that which (unless it be in consideration of such particular circumstances) ought to be done.

"A Dispensation is of a thing future, to allow of a thing to be done, that it not be accounted a crime, and makes the thing prohibited lawful to be done."

See "An Equiry into the Power of Dispensing with Penal Statutes," by Sir Robert Atkins, Knight of the Bath, and one of the judges of the Court of Common Pleas in the time of Charles II. and Lord Chief Baron of the Exchequer in the time of James II.

Sir Robert, after having shown what a dispensation is, proceeds to "give some instances of particular cases, wherein Dispensations have been allowed by our judges against the penalties of some particular Acts of Parliament" after which, he thus defines a Dispensation:

"It is an indulging of a privilege to some particular person, or to a corporation, allowing him or them to do a thing that is prohibited by some Act of Parliament [or city ordinance] (under a Penalty) without incurring the penalty. The doing whereof was lawful to all till that particular Law [or ordinance] did make it an offence to do it.

"I shall in the next place endeavor to trace out the Original of this Invention of a Dispensation, when it first began, and who was the Author of it, and shew, that it was looked upon as a Monster, and exclaimed against by Kings, and States, and all Good Men, and yet the Precedent was followed, and the Abuse of it spread and increased, and hath been ever since growing.

"I am not the first that have undertaken to make this discovery: In the argument of the case of *Comendam*, in Sir *John Davy's* Reports *fol.* 69, 6, it is said that the *non obstante* was invented and first used

in the Court of Rome, and they bring an author that denounced a Woe against the Court, for introducing so ill a Precedent, mischievous to all commonwealths in Christendom; for the Temporal Princes perceiving the Pope to dispense with his Canons, in imitation of him, have used it as a Prerogative to dispense with their Penal Laws and Statutes.

"And we may see how odious these Dispensations were, by the vile Epithets the learned and good men of that Age gave them."

XVIII.

In Com. *v.* Davis, 140 Mass.,485, decided Jan.8, 1886, the ordinance required "permit" of "a committee of the city council having charge of the Common and public grounds." (Rev. Ord., Chap. 37, sections 3 and 11.) The validity of that ordinance was contested as "invalid and void, because the City Council of Boston had no right, power, or authority to make it"; and, because "not reasonable. It is not necessary as a regulation to preserve the peace, or to prevent possible disturbance of the peace, but it is calculated to provoke and cause breaches of the peace, if enforced, or attempted to be enforced"; also for the reason that said ordinance had not been recorded and published and made known to the people.

The court said: "This ordinance is not inconsistent with any law of the Commonwealth, and we see no ground for holding it to be unreasonable and invalid. Its purpose is to promote the public peace, and to protect the public grounds from injury, and it is calculated to effect these ends without violating the just rights of any citizen."

By this declaration — this assertion — the court, without further reason, and without citing a single authority, upheld the ordinance.

"The reason of the law is the life of the law, for, though a man can tell the law, yet, if he know not the reason thereof, he shall soon forget his superficial knowledge."

Co. Litt., 183, b.

In Com. *v.* Plaisted, 148 Mass., the Rules of the Board of Police were in question, and were held to be valid as regulations, respecting the use of the public streets. That decision is of no authority in favor of the contention here in support of this ordinance. And *State v. White*, 64 N. H., 48, cited by the court in Com. *v.* Plaisted, in no way sustains the contention of the defendant in error here. In State v. White it was held that an Act of the Legislature prohibiting the beating of a drum in the compact part of a town, *and the obstruction of streets and sidewalks*, without the written permission of a majority

of the police officers or selectmen of the town, was a reasonable measure of prevention to avoid disturbances, and not an infringement of constitutional rights, and it was no defence to show that *such acts were done* in the performance of religious worship."

Was not this merely declaratory of the common law?

In Com. *v.* Abrahams, 156 Mass., 57, the defendant violated the Rules made by the Park Commissioners, under power directly conferred by Act of the Legislature to "govern and regulate" the Parks which they purchased and laid out under legislative authority.

It was clearly unnecessary and useless to invoke the "police powers" in that case, yet the court cite Barber *v.* Connolly — U. S. —, which was a case of "police regulation" to promote health, morals, and good order,— a case which supports the contention here of the plaintiff in error.

In Com. *v.* Abrahams, the court cite Com. *v.* Davis, *supra*, Com. *v.* Plaisted, and Quincy *v.* Kennard, 151 Mass., 563,— in which a Board of Health order about keeping hogs was held to be valid,— and Yick Wo *v.* Hopkins, which was disposed of with the statement that the case "was one of race discrimination."

But for a case *contra* Com. *v.* Abrahams, see State, ex. rel., Jameson *et al. v.* Denny *et al.*, 21 N. E. Rep., 252.

In Worcester Co. *v.* Ashworth, 160 Mass., 190, an assessment of damages under the Dog and Sheep law,— Pub. Stats., chap. 102, §106,— was *held* not final and conclusive.

In Trimble *v.* Bueyens, 21 Alb. L. J. 176, an ordinance made it unlawful *to disturb the peace and quiet of the village*, or any citizen there, by singing, speechmaking, etc. *Held* valid.

In Com *v.* Hamilton Manufacturing Co., 120 Mass. 383, a statute prohibiting employment of all persons under eighteen, and all women in manufacturing establishments more than sixty hours in a week, was *held* valid "as a health and police regulation."

In Com. *v.* Abrahams, 156 Mass. 57, the court speaking by *Mr. Justice* Lathrop said: "The case of Yick Wo *v.* Hopkins, 118 U. S. 356, on which the defendant chiefly relies, was one of race discrimination." But the opinion of this court, delivered by *Mr. Justice* Matthews, it is respectfully submitted, affords no warrant for this assertion.

Yick Wo, [also Wo Lee] was arrested upon the charge of carrying on business without the consent of the board of supervisors of San Francisco, as required by an ordinance of that city, viz.: "It shall be unlawful, from and after the passage of this order, for *any* person or persons to establish, maintain or carry on a laundry within the corporate limits of the City and County of San Francisco with-

out having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone."

The petitioner (for a writ of *habeas corpus*) was alleged to be a native of China, and still a subject of the Emperor of China, and his rights under the treaty of November 17, 1880, in which "Chinese laborers, or Chinese of any other class," are to be secure in "the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

Touching this question, *Mr. Justice* Matthews said: "The rights of the petitioners, as affected by the proceedings of which they complain, are *not less* because they are aliens and subjects of the Emperor of China. * * * The Fourteenth Amendment to the Constitution is *not confined to* the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to *all persons* within the territorial jusisdiction, *without regard to any differences of race*, of color or of nationality. * * * The questions we have to consider and decide in these cases, therefore, are to be *treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens* who now invoke the jurisdiction of the court."

Concerning the validity of that ordinance as affecting all persons whether citizens or aliens within the jurisdiction of the United States, in conformity to section 1977 of the Revised Statutes,—*Mr. Justice* Matthews said: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they *do not mean to leave room* for the play and action of purely *personal and arbitary power*. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, *sovereignty itself* remains *with the people*, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of *mere administration* the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the presence of public opinion or by means of the suffrage.

"But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man be compelled to hold his life, or the means of living, *or any material right* essential to the enjoyment of life, *at the mere will of another*, seems to be intolerable in any country where freedom prevails, as being *the essence of slavery itself.* * * * No reason whatever, except the will of the supervisors, is assigned why they [the petitioners] should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood." Respecting the real meaning of the ordinances of San Francisco in question, *Mr. Justice* Matthews said: "We are * * * constrained at the outset to differ from the Supreme Court of California. * * * That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is *nothing in the ordinances* which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. * * * The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint. * * * *It does not prescribe a rule and conditions, for the regulation of the use of property for laundry purposes, to which all similarly situated may conform.*"

If the principles of law enunciated by this court in *Yick Wo v. Hopkins*, are good and needful for alien Chinamen, then those principles may well be contended for as good and needful for American citizens, and a preacher of the gospel, in Boston, is not less entitled to immunity from arbitrary encroachments on his rights, than an unnaturalized Chinese laundryman in San Francisco.

The words, "All men are born free and equal, were inserted in the State Constitution of Massachusetts not merely as a moral or political truth, but with a particular view to the liberation of the negroes"; and the Fourteenth Amendment of the Constitution of the United States was made to secure the rights of the colored people in the South; but it has not been believed that none but the colored people may claim the benefit of these constitutional provisions.

Soon Hing *v.* Crowley, 113 U. S. 703 [28 : 1145] was a case of violation of an ordinance "adopted to *regulate* the establishment and maintenance of public laundries and ash-houses within certain limits of the City and County of San Francisco," and which it declared "endangered the public health and safety." It prescribed certain definite and reasonable rules and conditions to be observed in respect to "drainage and sanitary appliances," and protection of "surrounding property from fire." "The ordinance requires the health officer, and the Board of Wardens, upon the application of *anyone* desirous to open or conduct the business of a public laundry, to inspect the premises in which it is proposed to carry on the business, * * * and, if found satisfactory in all respects, to issue to the applicant the required certificates, without charge, for the services rendered."

"Its fourth section declares that no person owning or employed in a public laundry or a public wash-house, within the prescribed limits, shall wash or iron clothes between the hours of ten in the evening and six in the morning, or upon any portion of Sunday; and its fifth section declares that no person engaged in the laundry business within those limits, shall permit any one suffering with an infectious or contagious disease to lodge, sleep, or remain on the premises."

Mr. Justice Field, delivering the opinion of the court, said:— "The prohibition against labor on Sunday in this section is not involved here, * * * and the provision for the cessation of labor in the laundries within certain prescribed limits of the city and county during certain hours of the night, *is purely a police regulation*, which is, as we then said, within the competency of any municipality possessed of the ordinary powers belonging to such bodies. * * * And it is of the utmost consequence in a city subject, as San Francisco is, the greatest part of the year, to high winds, and composed principally, within the limits designated, of wooden buildings, that regulations of a strict character should be adopted to prevent the possibility of fires. * * * At any rate, of its necessity, *for the*

purpose designated, the municipal authorities are the appropriate judges. Their regulations in this matter are not subject to any interference by the federal tribunals, *unless they are made the occasion for invading the substantial rights of persons*, and no such invasion is caused by the regulation in question. * * * No invidious discrimination is made against any one by the measures adopted. * * * The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held *entitled to the different privileges under the same conditions*. * * * The principal objection, however, of the petitioner to the ordinance in question is founded upon the supposed hostile motives of the supervisors in passing it. The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the City and County of San Francisco, against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence there, and not for any sanitary, police, or other legitimate purpose. There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. * * * And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense."

In *Re* Flaherty, *supra*, in the opinion of a majority of the court it is said: "The ordinance is entitled 'An ordinance to promote safety and security to public travel by prohibiting the beating of drums and certain other noises on the traveled streets or avenues of the City of Redlands without special permission therefor,' and authorizing such permission in certain cases; and in the body of the ordinance it is made an offense, punishable by fine or imprisonment' for any to, among other things, 'beat a drum' upon any traveled street of the city 'without special permit in writing so to do first had and obtained from the president of the board of trustees of said

city, which permit the president of said board may grant whenever in his judgment, the issuance of the same shall not conflict with the aforesaid purposes of this ordinance, and not otherwise, provided that such permit shall specify the time, when and the street or avenue where any of said instruments shall be used as aforesaid. Petitioner [for a writ of habeas corpus] was convicted of beating a drum on the traveled streets of said city without a permit, contrary to the provisions of said ordinance. It appears from the petition that the petitioner had been in the *habit* of beating a drum on the streets *daily*, and that upon his application to the president of the board for a permit 'to engage in beating a drum as he had been heretofore doing,' the permit was refused; although, as appears from the petition, he was given a permit to beat his drum upon a certain occasion. He claims the right to beat his drum,—not on special occasions, as other people, but every day, without a permit, and despite the ordinance.

"There is no need of discussing the general power and right of a city to prohibit such noises on the streets as those made by the beating of drums. We do not understand counsel for petitioner as contesting such power, at all events, it certainly exists. But the point urged by petitioner is that the ordinance is void because it gives a certain officer authority to give permits to beat drums on special occasions; and this position is the only one which needs examination. * * * The continuous or daily beating of drums on the streets of a city would be *an intolerable nuisance*,—endangering the safety of teams and the occupants of vehicles drawn by animals, as well as of pedestrians liable to be injured by runaways, and stunning the ears with din so constant as to be almost insufferable. On the other hand, there is usually no objection to such noises on a few special occasions, —either when there are patriotic celebrations, generally participated in by all the people, or processions of a part of the people united in civic societies, political parties, etc. These occasions are comparatively few, and usually well known, so the people are prepared for them."

In support of this opinion holding the ordinance to be valid, I find cited, Pedrick *v.* Bailey, 12 Gray 161, in which an ordinance prohibited the use of certain awnings without the consent of the *Mayor and Aldermen;* Com. *v.* Abrahams, 156 Mass. 57, *supra;* Com. *v.* Davis, 140 Mass. 485, *supra*, and closing with: "It is entirely within *the reasoning* of the Supreme Court of the United States in Crowley *v.* Christensen, 137 U. S. 583, 34 L. ed. 620, which case also furnishes an answer to petitioner's claim of support from Yick Wo. *v.* Hopkins."

Whatever may be said of the decision in *Re* Flaherty, it may safely be averred that the cases cited to sustain it are quite useless for that purpose.

It is submitted that neither the decision, nor "the reasoning" of this court, speaking by *Mr. Justice* Field, in Crowley *v.* Christensen, *supra*, afford the least support to the decision given by the majority of the court in *Re* Flaherty.

In Crowley *v.* Christensen, the question was as to the validity of an ordinance regulating the issue of licenses to sell liquors and wines in quantities less than one quart in the city and county of San Francisco.

This court *held*, that the decision of the Supreme Court of California, that said ordinance is valid as authorized by the Constitution of that State, is binding upon this court, as no inhibition of the Constitution or of a law of the United States is violated by it.

In the opinion of *Mr. Justice* Field, it is said: "It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such *reasonable conditions* as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. * * * "Their sale [intoxicating liquors] may be absolutely prohibited. It is a question of public expediency and public morality, and *not of federal law*. The police power of the State is fully competent to regulate the business — to mitigate its evils or to suppress it entirely. *There is no inherent right in a citizen to thus sell intoxicating liquors by retail;* it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business *attended with danger to the community*, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils."

And *Mr. Justice* Field refers to Yick Wo *v.* Hopkins, and distinguishes that case from this of Crowley *v.* Christensen, and he quotes from the opinion in the former case: "'It [the ordinance] allows without restriction the use for such purposes [Laundries] of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in *previous use*, it divides the owners or occupants into two classes, *not having respect to their personal character and qualifications* for the business, nor the situation and nature and adaptation of the buildings themselves, but *merely* by an *arbitrary*

line, on one side of which are those who are *permitted* to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is *withheld at their* MERE WILL AND PLEASURE.' * * * It will thus be seen that that case was essentially different from the one now under consideration, the ordinance then held invalid vesting UNCONTROLLED DISCRETION *in the board* of supervisors with reference to a business *harmless in itself and useful to the community;* and the discretion appearing to have been exercised for the purpose of *depriving the petitioner of a privilege that was extended to others.*"

In *Re* Frazee, *supra*, "The petition for the writ of *habeas corpus* sets out that petitioner and his associates are members of an organization known as the Salvation Army, which had paraded in Grand Rapids during two years and more, and on repeated prosecutions for public nuisance had been acquitted, and that the ordinance in question had followed quite soon after the last acquittal. * * * On the 29th day of September, 1886, petitioner and seven others were arrested for having violated the ordinance on the previous evening. The charge made was that they 'did then and there parade in, upon and through the public streets of the city of Grand Rapids, to wit: * * * with musical instruments, banners and flags, while singing and shouting, without having first obtained the consent of the mayor or common council of the city of Grand Rapids,' contrary to the ordinance before named." The Supreme Court of Michigan, speaking by Campbell, C. J, among other things said: "If the Legislature of the State had the power to subject the people of cities to the uncontrolled and arbitrary will of a common council, and, having such power, had clearly signified their purpose to do so, then it might be claimed with some show of reason that the city of Grand Rapids could do what it pleased under these grants of power. But the rules of legal construction allow no such absurdity. It is not in the power of the Legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers. * * *

"This by-law is unreasonable because it suppresses what is in general perfectly lawful, and because it leaves the power of permitting or restraining possessions and their courses to an *unregulated official discretion*, when the whole matter, if regulated at all, must be by permanent legal provisions operating generally and impartially."

It may well be noted that Com. *v.* Davis, 140 Mass. 485, was decided Jan. 8, 1886; the ordinance of "Grand Rapids, passed on the 13th of September, 1886, * * * published on the 24th of the same month. The violation of it is alleged to have occurred on the

28th of September," and the decision of the court herein referred to, was October 28, 1886.

Com. *v.* Davis afforded a precedent, but was not followed or noticed in *Re* Frazee.

Anderson *v.* City of Wellington, *supra*, decided by the Kansas Supreme Court, November 10, 1888, was in respect to the validity of an ordinance made by said city, August 15th, 1887. Simpson, C., speaking for the court said, in part: "The ordinance in question makes it unlawful for any persons, society, association or organization to parade any public street, avenue or alley of the City of Wellington, shouting, singing or beating drums or tambourines, or playing upon any musical instrument designed, intended or calculated to attract or call together an unusual crowd of people upon such street, avenue or alley, without first having obtained in writing the consent of the mayor of said city authorizing such parades. * * * The ordinance is framed on the theory that an unusual crowd or congregation of people upon one of the public streets of a city is either of itself a disturbance of public peace, or that it threatens the good order of the community. A crowd of people is one of the most ordinary incidents of every day life in any city of considerable size in this country. A fire, a runaway, an unusual sight, collects a crowd as if by magic; and it is *not a fair estimate* of the character and habits of the American people to *assume that the public peace is threatened* when numbers of them congregate." The case *Re* Frazee is cited, approved and followed, the court further saying: "It is not a reasonable regulation to vest the power arbitrarily in the mayor to grant or refuse permission to any association of persons, combined for legal and meritorious purposes, to parade the streets with music. * * * All by-laws made to regulate parades must *fix the conditions* upon which all persons or associations can move upon the public streets, expressly and intelligently — such conditions operating on all of the same class alike and being reasonable in their requirements, and not oppressive in their operation; and must not give the power of permitting or restraining processions to an unregulated official discretion, and thus allow an officer to prevent those with whom he did not agree on controverted questions from calling public attention to the principles of their party, or the objects of their organization, in one of the most effectual methods known to associated effort."

In Crawford *v.* Topeka, *supra*, the validity of an ordinance providing that "no person shall erect any billboard or other structure for advertising purposes unless the same is placed at such distance from the line of any street or sidewalk as shall exceed at least five

feet the height of such billboard or structure," was *held* unreasonable and invalid, the court saying: "All statutory restrictions of *the use of property* are imposed upon the theory that they are necessary for the *safety, health* or comfort of the public; but a limitation *without reason or necessity* cannot be enforced. * * * Although the police power is a broad one, it is not without limitations, and a secure structure, which is not an infringement upon the public safety, and is not a nuisance, cannot be made one by *legislative fiat* and then prohibited. Gates *v.* Milwaukee, 77 U. S. 497."

In State *v.* Robertson, (45 La. Am.) 20 L. R. A. 691, an ordinance of the City of New Orleans providing for the inspection of steam boilers, and for a board of examiners and inspectors, was *held* illegal, null, and void. In the opinion of the court, by McEnery, J., it is said: "The contention of the City of New Orleans is that its charter authorizes it to pass all ordinances necessary to *preserve the peace* and good of the city, and to maintain its cleanliness and health; and therefore it has the power to enforce by fine and imprisonment the violation of any ordinance for the protection of life and property, and that said ordinance was enacted for the *protection of the lives* of the citizens of New Orleans. * * * There can be no doubt that it does *not* spring from the power to preserve the public peace *as incident to* that power."

In State *v.* Mahner, 43 La. Am. 496, *held*, that city ordinances which violate any of the recognized principles of legal and equal rights are *void*, so far as they do so.

In Chicago *v.* Trotter, 136 Ill. 430, the ordinance prohibited all parades or processions upon the streets of the city, and all open-air meetings, upon any ground abutting upon any street, without a permit from the police department. *Held*, that the ordinance was void, as it left the matter to the will or caprice of the superintendent of police; and the court said: "Parades and processions upon the streets of a city are not necessarily productive of danger and disorder, so as to render them *per se* the creators of public disturbances, nor are they necessarily nuisances. There is no authority, therefore, in the municipal corporation, to suppress such demonstration of all kinds, at all times, and under all circumstances. * * * It is subversive of the liberty of the citizen, and outside of the domain of the law, that authority so arbitrary should be lodged in one individual."

In Rich. *v.* Naporville, 42 Ill. App. 222, the city ordinance prohibited any person or association of any kind to parade any of the streets, with flags, banners, or transparencies, drums, horns, or other musical instruments, without the permission of the city council first had and obtained.

In its opinion the court said: "Ever since the landing of the Pilgrims from the Mayflower the right to assemble and worship according to the dictates of one's conscience, and the right to parade in a peaceable manner and for a lawful purpose, have been fostered and regarded as among the *fundamental rights of a free people*. * * *. If this ordinance is held valid, then may the city council shut off the parades of those whose notions do not suit their views and tastes in politics or religion, and permit like parades of those whose notions do.

When men in authority are permitted to exercise power so arbitrary, liberty is subverted, and the spirit of our free institutions violated. * * *. When the granting of the permit is left to the unregulated discretion of a small body of city aldermen, the ordinance *cannot be other than partial and* discriminating in its practical operation. The law abhors partiality and discrimination. Because this ordinance is unreasonable, oppressive, and so framed as to allow its enforcement to rest in *unregulated official discretion*, we must hold that it is *void*."

In State *v.* Hughes, 72 N. C. 25, the court says: "In a popular government like ours, the laws allow great latitude to public demonstrations, whether political, social, or moral." And the defendants who had joined in celebrating the emancipation proclamation, with drums, and fifes, and street marching, were held not guilty of creating a nuisance or obstructing the highway.

In Baltimore *v.* Radecke, 49 Md. 217, it was *held*, that,—"An ordinance which clothes a single individual with such power, *hardly falls within the domain of law*."

In Austin *v.* Murray, 16 Pick. 121, (1834) the validity of a by-law containing the provision that: "No person shall, without leave first obtained in writing, signed by a majority of the selectmen of said town of Charlestown, bring or cause to be brought into said town any dead body; or convey, or cause to be conveyed through any of the streets of said town, any dead body so brought into said town." By an Act of the Legislature of Massachusetts, the selectmen were authorized to make and establish "rules, orders, and regulations for the interment of the dead in said town, to establish the police of the burying grounds, to make regulations for funerals, and to appoint all necessary officers to carry the same into effect."

Wilde, J., delivering the opinion of the court, said: "Is then this part of the by-law a regulation for the interment of the dead? or does it amount to a prohibition? We think very clearly that it amounts to a prohibition, and was so intended by the selectmen of the town. The whole object of the 4th section appears very clearly

to have been, to prevent any dead body from being brought into the town for interment. Indeed the prohibition is express and absolute, excepting the qualification allowing the selectmen to grant license, &c., which was never intended to apply to the interment of the dead of the Catholic religion, in respect to which it is manifest the prohibition was meant to be absolute. The refusal of the selectmen to allow any such license on the application of the Catholic Bishop, without assigning any reason whatever, sufficiently show the intention and object of the by-law. But if it were otherwise, and this by-law were to be considered as a regulation and not a prohibition, still we think it unauthorized and illegal.

"A by-law, to be valid, must be reasonable; it must be *legi, fidei, rationi consona.* * * * But it cannot be pretended that this by-law was made for the preservation of the inhabitants. * * * And this by-law would seem to be void for another reason. A by-law for the total restraint of one's rights is void; as if a man be barred of the use of his land. * * * The illegality of a by-law is the same, whether it may deprive an individual of the use of a part or of the whole of his property; no one can be so deprived, unless the public good requires it. And the law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation. * * * The intention of the by-law was, to prevent the introduction of dead bodies into the town, and as this intention cannot be lawfully carried into effect, the whole object of the by-law fails.

The ordinance now before this Court was made to prevent preaching — and other speaking — on the common and public grounds of Boston, under the "guise" of preserving the peace, and protecting the grounds from injury, and in contempt of the Constitutional rights of the people.

In *Re* Garrabad, *supra,* an ordinance made it unlawful for any person or persons, society or association, or organization, to march or parade over or upon certain streets in the city of Portage * * * without first having obtained a permission to so march or parade, signed by the mayor."

Pinney J., speaking for the court, said: "The particular objections urged to the validity of the ordinance in question fall within the scope of the 14th Amendment to the Constitution of the United States. * * * These provisions apply equally to all persons within the territorial jurisdiction of the United States, without

regard to any difference of color or nationality: and the equal protection of the laws is a pledge, it is held, of the protection of equal laws. Yick Wo *v.* Hopkins, 118 U. S. 369, 30 L. ed. 226. * * *. The ordinance, as framed, and as it is to be executed under the arbitrary discretion of the mayor or other officer, is clearly an abridgement of the rights of the people; and in many cases it practically prevents those public demonstrations that are the most natural product of common aims and kindred. 'It discourages united effort to attract public attention and challenge public examination and criticism by associated purposes.' *Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110, contains a careful discussion of a similar ordinance, which was there held to be void, as contravening common right.

"In *Re Frazee*, 63 Mich. 396, after full discussion by Campbell, *C. J.*, a similar ordinance was also held void. * * * A careful examination of the decisions in various states, and the considerations upon which they are founded, is not material to the determination of the case, for the whole subject is governed and controlled by the provisions of the 14th Amendment to the Constitution of the United States. * * * The entire subject underwent careful examination in the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, when the subject of city ordinances and the principles regulating their validity were considered. * * * The objections urged in the case of *Baltimore v. Badecke*, 49 Md. 217, were also, in substance, the same for the ordinance in that case upon its face committed to the *unrestrained will of a single public officer* the power to determine the rights of parties under it, when there was nothing in the ordinance to guide or control his action, and it was held void because 'it lays down no rules by which its impartial execution can be secured, or partially prevented,' and that 'when we remember that action or non action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law.' * * * *It is entirely un-American, and in conflict with the principles of our institutions and all modern idea of civil liberty.* It is susceptible of being applied to offensive and improper uses, made subversive of the rights of private citizens, and it interferes with and abridges their privileges and immunities, and denies

them the equal protection of the laws in the exercise and enjoyment of their undoubted rights."

In Grand Rapids *v.* Newton, 69 N. W. Rep. 84, recently decided by the Supreme Court of Michigan, it was *held* that a city ordinance providing that no person shall allow or permit any indecent, loud or boisterous noise, or any fighting or other disturbance, in or about his house or tavern, inn, saloon, cellar, shop, office, or other residence or place of business, or permit drunkards or persons having the reputation or name of being prostitutes to congregate, visit or remain therein, is unreasonable, as not limited in its application to such assemblages or to such places of business as are *properly within police control*, and consequently *void*.

See in addition to cases before cited to the point that constitutional provisions are self-executory: —

Burrows *v.* Delta Transp. Co. (Mich.), 29 L. R. A. 468.
Hickman *v.* Kansas City, 120 Mo. 110.
Washington Home *v.* Chicago, 157 Ill. 414, 29 L. R. A. 798.
Illinois Cent. R. Co. *v.* Ihlenberg, 75 Fed. Rep. 873.

XIX.

The most dangerous judicial dogma of modern times is this *novelty* called "the Police Powers," in which there is more anarchism, than in all that the theoretical and practical anarchists have yet done, said, or imagined.

No valid law can be made by means of "the Police Powers," without the participation of the judiciary in the legislative or *law-making* power, which is in violation of our frame of gornment and prohibited in our constitutions.

Searching the constitution for authority to make such laws, and finding none, the search is continued to see if, in express terms, the making of such laws is prohibited, and upon concluding that there is no express prohibition of it, the Legislature enacts, and the Governor [or the President] approves it, but conditioned upon, and subject to, the decision of the Court as to the necessity for, and the reasonableness of this *inchoate* law.

The framers of our constitutions did not anticipate the need of prohihiting in express terms the exercise of this monstrous power, or its toleration by a free people. Not until a son had killed his father, did the old Romans think it needful to *prohibit* sons from killing their fathers.

An early and notable precedent for the claim, of "Police Powers," now set up, is that of the Persian King, who, desiring to marry his sister, consulted his judiciary, when he was told that, while there was no law of the kingdom authorizing it, there was *no prohibition* of it, and that, therefore, he could do *as he pleased,— which he did.*

"One fact of history may be considered as established,— that there has been, and is, the greatest amount of individual and political liberty in those nations whose governments are framed upon this tripartite model; and that just so far as the civil polity approaches towards a despotism are all species of power centred in *one* ruler or *body* of rulers. If the entire governmental force of a nation is wielded by a *single person* or *class* of persons, if he or they may at once make, interpret and execute laws, there is inevitably abuse of power, destruction of private rights, whether the one ruler be monarch, legislature, or the entire mass of the people.

"A proposition which is thus historically true, must have some firm foundation in the nature of things. The possession of power is one of the most dangerous gifts which can fall to the lot of humanity. The tendency is always to its abuse. Power grows upon itself. In a perfect state, it is not enough that the rulers at any given time should be perfect men. There must be checks so contrived as to resist the encroachments of authority, which are to be apprehended from the purest and most patriotic rulers."

Pomeroy, Const. Law §§169, 170.

The questions here involved have a deep interest not only to the plaintiff in error, but also for the men who, under similar ordinances, have been arrested in *Dover*, in the State of Delaware, in *Cleveland*, Ohio, and in other places, for exercising the rights of free public speech, and of free assembly, — and for all men who know their civil and religious rights and dare maintain them.

XX.

It was the assertion of arbitrary power and authority on the one hand, and resistance to that assertion and authority on the other that produced the American Revolution.

It was not the mere matter of the money demanded as a tax, but it was the arbitrary action, which, if tolerated, could, as John Adams said, "do all things."

If, without any hearing, Parliament, having "final discretion," at its will could command the money and property of the people by a

tax, then Parliament could here establish its Episcopacy — as it did in Ireland — and do any other thing against the natural and God-given rights of the people.

The exercise of such "final discretion" was not favored by our fathers. They had not the love for personal rule and arbitrary methods that a few people among us now seem to have.

Haman had "final discretion" and his purpose was to "preserve the peace," it being "the King's desire to have all his dominion in quiet and propriety," as it is given in the Greek and Latin versions. And as to this the words of Dr. Adam Clarke are still timely: "But a despotic government is ever capable of extravagance and cruelty; for as it is the bane of popular freedom and happiness, so it is the disgrace of political wisdom, and of all civil institutions. Despotism and tyranny in the state are the direct curses which insulted justice can well inflict upon a sinful nation."

Rehoboam was a young man who held to "final discretion," repudiating the advice of "the old men" who advised him to be the "servant of" the people.

Ahab was a stickler for the "peace;" and "Pilate's paramount duty was to preserve the peace in Palestine * * * What is wanted is not peace but *fair play*." James Fitzjames Stephen, Q. C. in Liberty, Equality, Fraternity, pp. 87, 102.

The court of Star Chamber was also "of the greatest use to preserve the peace," but, "the nation was *never easy* till that court was entirely suppressed by Act of Parliament."

"The problem of the distribution of the power of a society, so as to be most favorable to liberty, cannot be solved so long as too much power is given to a single man."

Montesquieu, Spirit of Laws, Book 11.

"Liberty only relates to the will when formed, and not before the will exists. * * * Liberty, in the most general acceptation of the word, is nothing else than the power of executing the will, and accomplishing our desires."

Com. and Rev. of Montesquieu's Spirit of Laws, pp. 96, 97, ed. 1811, Phila.

"As to religion, I hold it to be the indispensable duty of all governments, to protect all conscientious professors thereof, and I know of no other busiuess which government hath to do therewith."

Thomas Paine, Political Writings, Vol. 1, p. 54, ed. 1839.

"If our liberty has enfeebled the executive power, there is no design, I hope, to call in the aid of despotism, to fill up the deficiencies of the law." * * * "The people have no interest in disorder. When they do wrong, it is their error, and not their crime. But with the governing part of the State, it is far otherwise."

Burke's Works, Little, Brown & Co., ed. Vol. 1, pp. 439, 441.

Said Edmund Burke in his speech on Conciliation with America: "The claim of a privilege seems rather, *ex vitermini*, to imply a superior power; for to talk of the privileges of a State or of a person who has no superior is hardly better than speaking nonsense." * * * "The corporation of BOSTON *was not heard before it was condemned.*"

Of the power of the Colonial Governor of Massachusetts "to change the sheriff at his pleasure, and to make a new returning officer for every special cause," Burke said: "It is shameful to behold such a regulation among English laws"; and, "none of us who would not risk his life, rather than live under a government purely arbitrary." Works, Little, Brown & Co., ed. vol. 2, pp. 137, 164, 165.

What would Edmund Burke say, could he now read this Boston ordinance?

"Laws ought to arise out of circumstances, and be relative to certain definite ends."

Montesquieu, Spirit of Laws, Book 29, chap. 16.

"Civil laws, whatever be their source, to be adapted to the wants of any given community, must arise out of circumstances, and be relative to certain specific ends."

Wines' Com. on Laws of the Ancient Hebrews, p. 118.
See also, "Mosaic Interdictions," pp. 82–100 in The Wonderful Law, by H. L. Hastings.

This ordinance arose without any circumstance to warrant it. From the settlement of Boston to the time when this ordinance was made — but not published — no circumstances can be shown which prove the need of it.

As William H. Seward said in the Senate of the United States, —"it is righteousness, not greatness, that exalteth a nation," and "it is Liberty, not repose, that renders national existence worth possessing." * * * "Equal justice always excites fear, and therefore always gives offense, otherwise its way would be smooth and

its sway universal. *The abstractions of human rights are the only permanent foundations* of society." Works, vol. 1, pp. 102, 221.

In an address given in the council chamber, city hall, Feb. 29, 1888, at a public hearing before the committee on ordinances, by H. L. Hastings, editor of "The Christian," he said: "The ordinance against free public preaching, whose enforcement has made Boston a hissing and a by-word on two hemispheres, has been declared reasonable and necessary by the Massachusetts Supreme Court; but it has also been pronounced *unnecessary* by the mayor of the city of Boston.

"It has been my privilege to preach in the open air in the chief cities of Great Britain and America without license, let, or hindrance. I have spoken in the streets of London and Edinburgh, and in the north of Ireland, — but *not* in the south, — in New York, and in Washington to more people than could be accommodated in any hall in that city, and I have had no trouble with mobs, policemen, mayors or sheriffs, except in the city of Boston. * * *

"There is in Great Britain an Open Air Mission having nearly a thousand members, who are associated for the express purpose of outdoor preaching. I have repeatedly addressed those outdoor preachers, and have spoken in connection with them. When their secretary and manager, Mr. Gawin Kirkham, was in Boston, a few years ago, he could not speak on Boston Common without subjecting himself to prosecution.

"There are ministers and others who come to Boston for a day, who would gladly accept an invitation to address a crowd which might be gathered; but, if they are to hunt up the mayor, who may be miles away, or a committee, the chairman of which may be in his liquor store, or attending to his distillery, it will render outdoor preaching impracticable. And this is undoubtedly what *has been intended* by those city officials, who first being provided with an ordinance that no man shall speak upon the public grounds *without* a permit, have in the second place proceeded to declare that *no man should have a permit.* Thus the very men who have been empowered to *permit*, have assumed the right to utterly *prohibit* the preaching of the gospel upon the public grounds.

"After having been arrested and fined for speaking without a permit, and having been told by the judge on the bench that it was a very simple thing to get a permit, I made a written application for a permit. My application was treated with silent contempt. I afterwards applied again, and through the kindness of his Honor the Mayor I received a permit, but not until *fourteen months had elapsed* since my first application, during which time I had been fined and

imprisoned for preaching and reading the Bible. Nor am I at all certain that I should have received the permit even at that date, had not a large and influential body of ministers, by special vote, sent a request to the mayor to grant me a permit. If it were so difficult for *me* to obtain a permit, after preaching in this and other countries for nearly forty years, during more than a score of which I have also edited a paper in Boston, what would be the probability that an ordinary plain man would get a permit to speak in public places? The fact is, the city government of Boston has *determined to suppress outdoor preaching*.

"If the population of Boston has so changed, and has become so ignorant, so degraded, so turbulent, so inflammable, that their rights and liberties must be taken from them, then we wish to know this fact. If the Boston daily papers must be suppressed for fear they will publish articles which will rally a howling mob around the doors of Faneuil Hall, then we must accept the situation, and bid adieu to free press and free speech. If the populace of Boston cannot be trusted to listen to the gospel of Christ on Boston Common without creating a tumult, then we may be obliged to abandon our rights and our theory of government."

XXI.

The government of the State of Massachusetts was created by the people, who made the constitution, which consists of a "Declaration of Rights and Frame of Government," based on the doctrine of the "Social Compact."

The end or object declared is,—"to secure the existence of the body politic, to protect it, and to furnish the *individuals* who compose it, with the power of enjoying in safety and tranquility, *their natural rights, and the blessings of life*"; and *no other* end or object is stated.

By this constitution, the people retain *all* of their natural and related — but not absolute — rights.

"It is the duty of the people, therefore, in forming a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may at all times, find his security *in them*."

By the "Declaration of Rights," the power of the legislature to infringe on these natural and reserved rights of the people *is denied and taken away*.

By the men who framed this government, the *dangerous dogma* of "police powers" was unknown.

The sole power and authority of our legislature is to make laws, "wholesome and reasonable," and not "repugnant or contrary to this constitution."

Part the Second, Chap. 1, Art. 4.

Article 2, of the amendments confers on the legislature power and authority to "constitute municipal or city governments, in any corporate town or towns in this commonwealth, and to grant to the inhabitants thereof such powers, privileges and immunities, *not repugnant* to the constitution, as the general court shall deem necessary or expedient for the regulation and government thereof."

Now, arguments to support this ordinance, must be found not only *outside* of our constitution, but in theories, doctrines and *dogmas, utterly subversive of it*,—in ideas, the prevalence of which would have been the delight of Charles I., *and saved his head.*

There are those, however, who seem to be unable to distinguish between the natural, inherent and inalienable Rights of Man, recognized, secured, and regulated in our State and Federal Constitutions —those rights which existed before any constitution was made, and which these constitutions were made solely to protect—and the *unrecognized and unsecured privileges* desired and pleaded for by saloon keepers, and other sellers of intoxicating liquors, theatre and circus managers, organ-grinders, highway obstructors, Sunday public-ground dancers, blasphemers, and public nuisances.

To this Honorable Court comes the plaintiff in error believing that here this essential distinction has already been made and will not now fail of recognition. He seeks no special privilege ; he wishes not to interfere with the rights and immunities of other persons ; but, with the command of Christ upon him, he cannot surrender or consent to be robbed of his highest civil rights, and his religious liberty.

JAMES F. PICKERING,
Counsel for Plaintiff in Error.

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Office Supreme Court, U. S.
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MAR 15 1897
JAMES H. MCKENNEY,
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OCTOBER TERM, 1896.

No. 229.

William F. Davis, Plaintiff in Error,

v.

Commonwealth of Massachusetts, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

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WILLIAM F. DAVIS, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS, DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

The Public Statutes of Massachusetts, chapter 27, section 15, provide that "towns may make for the following-named purposes in addition to other purposes authorized by law such necessary orders and by-laws, not repugnant to law, as they may judge most conducive to their welfare, and may affix penalties . . . for breaches thereof: —

"For directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof."

The charter of the city of Boston, Mass. Sts. 1854, chapter 448, section 35, provides that the city council shall "have power to make all such needful and salutary by-laws or ordinances, not inconsistent with the laws of this Commonwealth, as towns by the laws of this Commonwealth have power to make and establish, and to annex penalties, etc."

The Revised Ordinances of the city of Boston (1892), chapter 73, section 66, duly ordained under the authority of said charter, provide that "no person shall, in or upon any of the public

grounds, make any public address, discharge any cannon or fire-arm, expose for sale any goods, wares or merchandise, erect or maintain any booth, stand, tent or apparatus for the purposes of public amusement or show, except in accordance with a permit from the mayor."

This ordinance has been sustained by the Supreme Judicial Court of Massachusetts as being within the authority of the Constitution of the State, the statutes of the State, and the charter of the city of Boston; and no question thereon is now open.

Commonwealth *v.* Davis, 162 Mass. 510.
Commonwealth *v.* Davis, 140 Mass. 485.

(The case last cited was against the same defendant for a similar offence under a similar ordinance.)

The plaintiff in error was convicted before the Municipal Court of Boston upon a complaint brought under the ordinance above quoted. The charge in the complaint was that the said Davis, "in and upon certain public grounds of said city . . . called the 'Common,' did make a public address, the same not being then and there in accordance with a permit from the mayor of said city, against the peace of said Commonwealth, the form of the statute of said Commonwealth, and the revised ordinances of said city in such case made and provided." (Record, p. 2.)

The plaintiff in error filed a motion to quash the complaint in the Municipal Court which was overruled. (Record, p. 3.)

The plaintiff in error appealed from the Municipal Court to the Superior Court, and was there tried by a jury upon his plea of not guilty, and found guilty. Before trial he renewed his motion to quash, which motion was again overruled. He also requested the court to give certain rulings and instructions to the jury, which were refused. (Record, pp. 6 and 7.)

His case was heard in the Supreme Judicial Court upon his exceptions to the rulings and refusal to rule of the Superior Court. (Record, pp. 4, 5, 6 and 7.)

These exceptions were overruled. The decision of the court is printed in the record on pp. 10 and 11, and is published in the Massachusetts Reports, vol. 162, p. 510.

He was thereupon sentenced in the Superior Court to pay a fine of twenty dollars and costs, amounting to thirty dollars.

QUESTIONS RAISED BY THE ASSIGNMENTS OF ERROR.

The first assignment of error is as follows: —

"1. The court erred in overruling the defendant's motion to quash the complaint."

The motion to quash alleged seven reasons for quashing the complaint. But the first five raise no federal question, and are for matters within the exclusive jurisdiction of the State courts. The fifth, sixth and seventh reasons allege that for reasons stated therein the ordinance is in violation of the provisions of section one (1) of article fourteen (14) of the Amendments to the Constitution of the United States.

The second assignment of error is as follows: —

"2. The court erred in refusing to rule at the trial of said case, as requested by the defendant (as shown by his exceptions duly filed and allowed in this case), that said ordinance invests the mayor of the city of Boston with arbitrary, unregulated, irresponsible and dictatorial power, utterly at variance with our principles of government, and subversive of the rights acknowledged and secured to this defendant in and by the Constitution of Massachusetts and of the United States, and especially by the Fourteenth Amendment of the United States. [*Sic.*]"

The only question raised by this assignment is whether the ordinance violates article one of the Fourteenth Amendment of the Constitution of the United States.

The third assignment of error is as follows: —

"3. The court erred in refusing to rule at the trial of said case, as requested by the defendant (and as shown by his exceptions duly filed and allowed in said case), that said ordinance is not needful and salutary and is not reasonable; that it is not reasonable as a regulation respecting the care, custody and management of the Common and other public places and grounds for free public preaching and speaking, and said ordinance is not warranted by the charter of the city of Boston, and said ordinance is without any constitutional and legal authority and is null and void."

It is submitted that this assignment of error does not raise a federal question. Whether the ordinance is needful and salutary or reasonable, whether it is warranted by the charter of the city of

Boston, and whether it is without constitutional or legal authority, are questions of interpretation of the Constitution and statutes of Massachusetts as applied to the ordinance, and are exclusively for the courts of the State. They have been determined in this very case adversely to the plaintiff in error.

Commonwealth *v.* Davis, 162 Mass. 510.
Barbier *v.* Connolly, 113 U. S. 27, 30.

The exceptions, it is true, recite the evidence given at the trial. By this evidence it appears that the plaintiff in error is a clergyman, and that the substance of the offence for which he was convicted was the preaching of a sermon on the Common without permit from the mayor. A crowd of from one hundred and fifty to two hundred was assembled to hear him, but there was "no disorder or disturbance" in the opinion of the policeman who testified. (Record, pp. 5 and 6.)

This recital of evidence, however, does not affect the question raised. At most it serves only to illustrate the scope of the ordinance, and to show that the term "public address" is intended to include sermons as well as political or other harangues. The plaintiff in error does not show and cannot pretend that the operation of the ordinance was unequal or that it discriminated against him. There is no evidence, even, that the mayor ever refused him a permit, or that he ever asked for one. On the other hand, it will scarcely be denied that although the mayor would have been entirely willing to give him a permit, the plaintiff in error constantly refused to ask for such a permit, and has contended and still contends solely for the right to preach on the Common without a permit.

No question, therefore, is presented as to the validity of an ordinance "fair on its face but contrived to work oppression to a few engaged in a single occupation," as in

Fong Yue Ting *v.* United States, 149 U. S. 698, 744.

The assignments of error thus resolve themselves into the single question whether the ordinance of the city of Boston above quoted is in violation of section one of the Fourteenth Amendment of the Constitution of the United States.

THE PURPOSE OF THE FOURTEENTH AMENDMENT.

Article one of the Fourteenth Amendment of the Constitution since its adoption in 1870 has been construed by this Court more frequently than any other provision of the Federal Constitution. The two provisions which will be claimed to be applicable to this case, to wit, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unitde States;" and that no State shall "deny to any person within its jurisdiction the equal protection of the laws," have been invoked in many cases to nullify a State or municipal law; but almost without exception unsuccessfully. It is believed in but one case, that of *Chicago, M., and St. Paul Railway Co.* v. *Minnesota*, 139 U. S. 418, have these provisions been held to nullify a State law, not including cases involving race distinctions. In this case a statute authorizing a railroad commission to impose arbitrary rates of transportation upon railroad companies was held to be in conflict with the provisions guaranteeing to all persons "the equal protection of the laws." But even in this case the clause chiefly relied upon to sustain the decision of the Court was that which prohibits a State from depriving a person of property "without due process of law." With the possible exception, therefore, of this case, no statute has yet been brought to the attention of this Court (not imposing race discriminations) which has been held to be in conflict with these provisions of the amendment. The section has, in fact, come to be regarded by the bar chiefly as the last and desperate resort of persons seeking to delay the penalties of State laws by raising a federal question as to their constitutionality.

In the first case decided under this amendment it was held by this Court that the first clause was intended primarily to confer citizenship upon the negro race; that its aim was against discrimination because of race or color, to protect an emancipated race and to strike down all possible legal discriminations against those who belong to it. This proposition has been often reaffirmed, and has constantly guided the Court in construing the meaning of the amendment.

Slaughter-house cases, 16 Wallace, 36.
Strauder *v.* West Virginia, 100 U. S. 303.
McPherson *v.* Blacker, 146 U. S. 1.

IT DOES NOT ABRIDGE THE POLICE POWERS OF STATES.

It was not intended that the Amendment should interfere with the power of the State to prescribe regulations to promote the health, peace, comfort and good order of its people; and all attempts to nullify by its provisions laws made in exercise of the police power inherent in the States have failed in this court.

Barbier *v.* Connolly, 113 U. S. 27.
Mugler *v.* Kansas, 123 U. S. at p. 663.
In re Rahrer, 140 U. S. 545.
Munn *v.* Illinois, 94 U. S. 113.
Lawton *v.* Steele, 152 U. S. 133.
Natal *v.* Louisiana, 139 U. S. 621.

THE ORDINANCE IS A POLICE REGULATION.

The ordinance of the city of Boston is purely a police regulation, made for the well-being, good order and comfort of all citizens, uniform and equal in its operation, conferring no class distinctions and imposing no class discriminations. The Common is a part of the public grounds of the city of Boston, and is so described in the complaint. It is a public park, dedicated to the use of all citizens as a place of recreation. It would be inconsistent with such dedication to permit it to be used by any man or class of men for the purposes of commerce or business, or for the erection of buildings or other structures. It would interfere with the comfort of those resorting to it for the purpose of recreation to permit the indiscriminate use of it for the discharge of cannon or firearms. It would be an appropriation of it to private purposes for any man to use it as a forum in which to collect audiences and make public addresses of any kind.

The ordinance aims to secure to the public the use and enjoyment of the park for purposes of recreation by the prohibition of such usurpation to private use and for private purposes.

It would clearly be a legitimate exercise of the police powers of the State, exercised through the city government, to forbid absolutely such things as the ordinance refers to. Suppose a man were drawing a crowd in one part of the Common to listen to a political address; while in another place a socialist should be addressing a

party of his followers upon his peculiar doctrines; in still another locality a body of strikers should be assembled to discuss their grievances; while scattered here and there through the park were men of different religious beliefs exhorting their followers; such a Common would be, to say the least, not a place of rest and recreation for the general public to whose use it is dedicated. Such an easily supposable abuse of the privileges of the park this ordinance aims to prevent. It prevents not the use but the appropriation of the Common.

But, as in many like cases, it may happen that under reasonable restrictions and regulations and to a limited extent the things prohibited by the ordinance would not materially interfere with the right of the public to the legitimate use of the Common for the purposes of recreation. The ordinance, therefore, instead of making the prohibition absolute, requires those desiring to make such special and private appropriation of a portion of it first to obtain a permit from the municipal authority; and instead of requiring legislative action on a matter of so slight moment, which would be onerous and inconvenient, confides the discretion of permission to the chief executive magistrate of the city. This limitation operates equally upon all, and imposes the same restrictions upon all persons alike. No one obtains under it special privileges, and no one is discriminated against.

THE CONTENTION OF THE PLAINTIFF IN ERROR.

The contention of the plaintiff in error is that this salutary, reasonable and liberal ordinance, uniform in its operation, dealing with a matter purely within the police power inherent in States to make laws regulating the conduct of its citizens for the public good, is in violation with the provisions of an Amendment to the Constitution designed and construed by this court as intended principally to prevent race discriminations.

He bases this contention upon two propositions, viz.: —

First. That the ordinance is in derogation of and violates the rights secured to him and to all citizens of the United States by the provisions of the Fourteenth Amendment.

Motion to quash, 5th reason, Record, p. 3.

Secondly. That it invests the mayor with "arbitrary, unregulated, irresponsible and dictatorial" power, at variance with our principles of government and subversive of the rights secured by said amendment.

Assignment of errors, 2d assignment, Record, p 13.
Motion to quash, 6th reason, Record, p. 3.

NO PRIVILEGES OR IMMUNITIES OF THE PLAINTIFF IN ERROR ARE ABRIDGED BY THE ORDINANCE.

As to the first contention it is difficult to understand definitely what "privileges" he is deprived of. It will not be disputed that the "privileges and immunities" which are guaranteed to him by the amendment are his rights as a citizen of the United States, and not those which he has as a citizen of Massachusetts. They do not include "those fundamental civil rights for the security and establishment of which organized society was instituted, and which remain with certain exceptions mentioned in the Federal Constitution under the care of the State government."

McPherson *v.* Blacker, 146 U. S. 1, 37.

He will probably contend that his right of "freedom of speech" secured by the First Amendment to the Federal Constitution has been abridged by the ordinance. But freedom of speech does not mean that a man may speak everywhere. It is freedom as to substance, rather than as to place, that the article refers to. A man may not make a speech on another man's lawn; nor even in the street near one's house late at night. He may not preach a sermon at a town meeting. He cannot even speak on the question before the assembly there till the moderator gives him the floor. He would not be allowed to impede travel by making public addresses on the highway. Freedom of speech is not absolute. It is necessarily limited by and subject to the rights of others.

The plaintiff in error conceives that he has an inherent right to preach a sermon; and complains that this ordinance takes away from him that which he regards as a sacred right. It does nothing of the sort. It does not prevent him from preaching a sermon; it merely prevents him from preaching it on the Common, where he is liable to disturb others who have also the right to be there. It

does not even absolutely prevent him from preaching there; it only requires him to do what everybody else is required to do, first get a permit; and he does not show that a permit has been refused him.

On the contrary, instead of being discriminated against, the real essence of his complaint is that discriminations are not made in his favor. The wholesome restrictions that regulate harangues by social agitators, by politicians and by all classes of orators, he contends should not be applicable to him because he calls his speech a sermon. Sermons are often useful and edifying, but they are not to be privileged.

The same considerations apply to the right of the free exercise of religion secured by the First Amendment. Freedom as to religious belief and worship does not imply that a man shall be at liberty to proclaim his views in all places and at all times, regardless of the comfort and convenience of others. Preaching is by no means of the essence of religion.

The constitutional right of free speech and of worshipping God according to the dictates of his own conscience is secured to every citizen. But there is no constitutional right to occupy Boston Common for either of these purposes.

McAuliffe *v.* New Bedford, 155 Mass. 216.

AS TO THE RIGHT OF PERMIT VESTED IN THE MAYOR.

The contention of the plaintiff in error that the ordinance gives to the mayor arbitrary powers, and for that reason is unconstitutional, is not supported by the decisions nor upon principle.

The principal purpose of many, if not most, of the laws enacted under the police power of the States is regulation, rather than absolute prohibition. There are many things not necessarily harmful but which may become so in the absence of wholesome restrictions and proper limitations. It has consequently been found wise and salutary in many cases to provide that the doing of certain things shall be forbidden unless a license or permission for the doing of them be first obtained from the governing power or from some responsible officer to whom the granting of such licenses is delegated. Every State in the Union from the earliest times has enacted numerous laws of this kind, and the constitutionality of

such license laws is too firmly established to admit of serious discussion.

In Massachusetts, for example, the following things and occupations are prohibited by the General Statutes without a license from some officer, board or tribunal; and in many of these cases the discretion of the licensing board is practically uncontrolled: —

Maintaining a ferry, ch. 55.
Auctioneers, ch. 67.
Peddlers, ch. 68.
Liquor dealers, ch. 100.
Innkeepers, ch. 102.
Intelligence offices, ch. 102.
Junk dealers, ch. 102.
Pawnbrokers, ch. 102.
Selling oil, ch. 102.
Keeping dogs, ch. 102.
Keeping billiard tables for public use, ch. 102.
Theatres, ch. 102.

It is presumed that as many or more such matters are so regulated in other States.

The ordinance in question belongs to this class of police regulations. To prohibit entirely the making of addresses, the firing of cannon, the keeping of booths and the selling of merchandise on public parks would undoubtedly be constitutional. But it would be unnecessarily severe, for to a reasonable extent and under proper circumstances all these things might be permitted without public injury. Some authority less cumbersome and unwieldy than the legislative body should be entrusted with the right to grant such permits. It was deemed expedient to commit this power to the mayor, the chief officer of the city, sworn to protect its interests, and responsible to the people; and this ordinance so provided. This is ordinary police legislation of a salutary sort.

Such legislation in matters concerning the general good, imposing prohibitions against doing certain things without a license, is so universal, and its validity so well settled, that it has rarely been questioned in this court. But there are some decisions in point.

Presser v. *Illinois*, 116 U. S. 252, sustained as not in conflict with the Fourteenth Amendment the constitutionality of a State statute forbidding the forming of military companies without the permission of the governor.

Packet Co. v. *Catlettsburg*, 105 U. S. 559, sustained a town ordinance prohibiting the landing of vessels in certain places without the permission of a wharf master.

In *Crowley* v. *Christensen*, 137 U. S. 86, a State license law regulating the sale of intoxicating liquors was considered with reference to the Fourteenth Amendment and sustained.

In the same effect, although the question was not directly raised, was *Gray* v. *Connecticut*, 159 U. S. 74.

The plaintiff in error may rely upon *Yick Wo* v. *Hopkins*, 118 U. S. 356. The opinion of Mr. Justice Matthews characterized the provisions of the ordinance there in question, which vested in a board of supervisors the power of giving or withholding their consent to the use of wooden buildings for laundry purposes, as a "naked and arbitrary power," for the reason, as stated in the opinion, that "the power given to them is not confided to their discretion in a legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." (Page 366.) But further on in the same opinion the learned justice clearly distinguishes the provisions of the ordinance in question "from the not unusual case where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns or places for the sale of spirituous liquors and the like, . . . because in such cases the fact of fitness is submitted to the judgment of the officer and calls for the exercise of a discretion of a judicial nature." (Page 368.)

Whether, if the decision in *Yick Wo* v. *Hopkins* turned solely upon the construction of the licensing words of the ordinance, it would apply to the present case need not be considered; for an examination of the case shows that the principal ground upon which the decision was based was that the ordinance was shown to be so administered in fact as to work race discriminations. This view of the case has been sustained by this court.

> Fong Yue Ting *v.* United States, 149 U. S. 698, 744.
> Crowley *v.* Christensen, 137 U. S. 86, 94.

But in case of the Boston ordinance no such state of things is presented. There is nothing to show that the ordinance was administered so as to operate unjustly, nor that it was intended otherwise than to confide the granting of permits to the sound dis-

cretion of the mayor. The contrary was expressly held by the State court. Mr. Justice Holmes, in giving the opinion, said: "We have no reason to believe, and do not believe, that this ordinance was passed for any other than its ostensible purpose, namely, as a proper regulation of the use of public grounds."

Commonwealth *v.* Davis, 162 Mass. 510, 512.

Nor is there anything in the facts of the case, as shown by the record before this court, to bring it within the principles upon which *Yick Wo* v. *Hopkins* was decided.

MEANING OF THE EXPRESSION "EQUAL PROTECTION OF THE LAWS."

The Fourteenth Amendment guarantees to each person the equal protection of the laws. But this does not mean that every man shall be allowed to do what every other man does. Equality of protection under the laws implies that all persons shall be subject to the same general regulations, admissible to the same privileges and liable to the same penalties. Nothing is denied to the plaintiff in error by the ordinance in question that is not denied to every citizen of the United States.

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